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R E P O R T S

O F

C A S E S

A D J U D G E D I N T H E

Court of King's Bench

Since the Time of LORD MANSFIELD'S
Coming to preside in it:

By SIR JAMES BURROW.

With TABLES

Of the NAMES of the Cases,

A N D

Of the MATTER contained in them.

VOLUME the FOURTH:

Beginning with *Michaelmas* Term 7 G. 3. 1766,

A N D

Ending with *Hilary* Term 10 G. 3. 1770, (inclusive.)

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ADVERTISEMENT.

NO SETTLEMENT-Cases are reported in this Volume; nor is any *Abridgement* of them contained in the Table at the End of it.

The Reason of this Omission is, that I have already published them (in a separate Collection in Quarto) as far as the 4th of *July* 1772; and hope to be able, before next *Michaelmas* Term, to publish a Supplemental Continuation of them quite up to that Term, in a very small Quarto Volume.

Lately published (in QUARTO)

A

S E R I E S

OF THE

D E C I S I O N S

O F

The COURT of King's Bench

UPON

SETTLEMENT-CASES;

From *March* 1732, to *July* 1772;

With proper TABLES:

BY SIR JAMES BURROW.

In Two VOLUMES.

Sold by EDWARD BROOKE.

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Correct the running Title of the *Term*, at the Top of the 13
Pages from pa. 2130 to pa. 2143. by altering "*Michaelmas*
" Term 7" into "*Michaelmas* Term 8."

Michaelmas

Michaelmas Term

7 Geo. 3. B. R. 1766.

[Sir *John Eardley Wilmot* having (on the 21st of *August* last) Thursday 6
Nov. 1766. been appointed Lord Chief Justice of the Court of Common Pleas, in the Room of Lord *Camden*, to whom the Great Seal was delivered upon the Earl of *Northington's* resigning it; Mr. *Serjeant HEWITT* was yesterday appointed a Judge of this Court; and took his Place upon the Bench, this Morning.]

Rex versus Inhabitants of Castleton.

[This Case is already reported *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, No. 183. Page 569. and *abridged*, in the Table to it.]

Rex versus John Price Esq.

Friday 7
Nov. 1766.

CAUSE was shewn why an Information should not go against the defendant, a *Berkshire* Justice of Peace residing at *Wantage*, for a Misdemeanour in oppressively sending to gaol some poor Inhabitants of the Parish of *Child ry*, for FELONY in gleaning a Field of *John Simmons* a Farmer of that Parish; (which they insisted they had a *Right*, by *Law* and by the *Custom and Usage* of that Parish, to do;) and for refusing to discharge them out of Custody, after they had found Bail.

The Field of Barley was partly cut; but not carried in, a third Part of it being on the Ground; nor indeed completely raked and cocked, when these Gleaners took it away. Oath was made

by the Farmer, before the Justice, "that these People had
 " *stolen* his Barley in the Straw:" And he now swore "that He
 " had forbidden them; and yet they took it by Handfuls; and
 " that He had suffered the Loss of about twenty Bushels of Bar-
 " ley, by their carrying it off, two Days together."

Mr. *Morton*, who shewed Cause on Behalf of the Justice, denied the RIGHT which these People claimed; and said that the Justice was *obliged* to proceed against them as He had done; a *Felony* having been *sworn* upon them, and they having no Bail then ready*: For their Bail refused to bail them till *after* the Justice should have first committed them. He did accordingly commit them; not to the County-Gaol, but to the House of Correction: And then He alone did bail them, taking only One single Bail; and thereupon *ordered* them to be discharged; though He did not immediately sign a *Warrant* of Discharge. He denied all Malice, and any Design of Oppression.

* The Justice heard the Complaint, and asked them if they had any Bail: But one Winterbourne insisted that they should be first committed; and then He would be Bail for them. There were seven of them, Men and Women. They were encouraged by a neighbouring Attorney.

Sir *Fletcher Norton*, *contra*, insisted on the *Right* of the Poor, to glean, after the Corn is carried off the Land: And He said that they would be *justified*, in an Action of Trespass, for entering such Land in order to glean, under the Common-Law Right of so doing.

The Fact could not, He said, be a *Felony*: At the utmost, it could be but a *Trespass*. But it really was neither: For, by Law, they had a *strict Right* to do it. However, *if* it were a *Felony*, the Justice had no Right to commit them to the *House of Correction*; nor had He alone any Power to bail them†. It is plain that He *knew* it was *not* a *Felony*.

† V. 1 & 2 Ph. & Mary, c. 13. § 3.

Lord *Mansfield*—STEALING, under the *Colour* of leasing or gleaning, is not to be justified.

Now the Charge against these People is *Stealing* the Barley, before the Crop was carried off; and when Part of it was not cut, and a third Part left on the Ground, not yet carried in. There does not appear to be any Sort of Contest between the Farmer and the Poor about *Leasing*: His only Objection, and His Forbidding, is confined to the *Stealing* it.

No Malice or Oppression at all appears in the Conduct of this Justice: The Malice seems to lie on the other Side. The Malice seems to be in the Attorney, who carries on the Prosecution against Him.

Therefore the Rule ought to be discharged with Costs.

Mr. Justice *Yates* said, He could not see that the Justice had acted with any Criminality or bad Intention; but rather with Lenity: And in such a Case, the Magistrate ought to be protected, not punished.

As to the *Right* of Leasing—It will be Time enough to determine *that* Point, when it comes directly in Question.

But here, the Farmer had not abandoned his Corn, or carried it off: And He has sworn that they *stole* it.

Mr. Justice *Aston*—He has acted with Moderation and Lenity. The Rule ought to be discharged with Costs.

The Right of Leasing is no Part of the present Question. It may be exercised by Law or Custom, in a certain Degree: But *that* Question may depend upon Circumstances. *This* is no Question about the Right of Leasing or Gleaning: It is a Charge of *Stealing* the Corn; and Oath is made of their having *stolen* it.

Mr. Justice *Hewitt*—The Right of Leasing does appear in our Books: But it must be under proper Circumstances and Restrictions. However, it is no Part of the Question here: For this is a Charge of *direct Stealing*.

The Justice appears to have acted in this Case without any Design of Oppression, or Malice, or any bad Intention: On the contrary, He has behaved with Lenity and Tendernefs. It would be very wrong to punish a Justice of Peace by the extraordinary Method of an Information, when He has acted fairly, honestly and impartially.

Therefore this Rule ought to be discharged with Costs.

Per Cur'. unanimously—

Rule discharged with Costs.

Bennet, Administrator, *versus* Coker.

Saturday 8
Nov. 1766.

MR. *Dunning* moved, on Behalf of the Plaintiff, an *Administrator*, for Leave to *discontinue*, without Payment of Costs.

This

This was an Action upon a Bond, against an Heir. On the Plaintiff's not trying it according to Notice, the Defendant moved for Judgment, as in Case of a Nonsuit: Whereupon, the Plaintiff undertook to try it peremptorily. When it came down to Trial, He *first* discovered "that the Estate had been conveyed;" and was then satisfied "that there was a *Deed of Conveyance*, which would be produced at the Trial." Whereupon He declined to go to Trial; and now desired to discontinue.

* V. ante,
Page 1584,
and 1586.

Mr. *Thurlow*, on Behalf of the Defendant, opposed his doing so, without paying *Costs*. He mentioned the Case of *Hawes*, Executrix, versus *Saunders*, M. 5 G. 3 *. where it was determined "that an Executor shall pay Costs for not going on to Trial, after having given Notice of Trial: And he argued, that so He shall likewise, where He has not tried it pursuant to his *Undertaking*, after a Motion has been made against Him for Judgment as in Case of a Nonsuit. For this was his own Laches: He ought to have been previously informed of the Facts upon which he grounded his Action.

Lord *Mansfield*—This may be reasonable in a Case where the Executor may probably bring another Action. But here, I suppose, He will be bound *not* to bring another Action?

Mr. *Dunning* readily agreed to be so bound.

And THE COURT observed, that on a Judgment as in Case of a Nonsuit, an Executor does *not* pay Costs.

Mr. *Thur'ow* urged, that here, the Executor has *positively undertaken* to try it; and thereby put the Defendant to the Expence of going down to Trial. And they may go on again: they will not be absolutely precluded.

Lord *Mansfield*—Here is no double Vexation. The Plaintiff agrees not to try it; but withdraws the Cause at the Assizes, upon finding that there is a Deed against Him. So that there is an End of the Matter.

Mr. Justice *Aston* observed to Mr. *Thurlow*, that the Defendant had saved all the Fees of Court; which he must have paid, if there had been a Verdict. (Which observation was repeated and confirmed by Lord *Mansfield*.)

Mr. Justice *Yates*—It is not in *all* Cases, that an Executor shall discontinue *without* paying Costs: For, if it is plainly his own

own Fault, He shall not have such Leave. So, in Case of not going on to Trial, if it is his own Laches, He shall pay Costs. (To which also Lord *Mansfield* agreed.) Therefore the Question is "whether there is *Laches or Delay*; or whether it be a fair "Transaction." Now *this* was fair and candid. The Plaintiff has done *better* for the Defendant, than if he had gone on to Trial: He discovered He was in the wrong; and as soon as He knew it, desisted.

THE COURT granted Mr. *Dunning's* Motion, "to "discontinue *without* Payment of Costs:" But the plaintiff was not to bring any new Action, without *Leave of the Court. [*There might perhaps, arise Assets *in futuro*: And then it would be reasonable for the Executor to have Leave to bring a new Action.]

Brown, qui tam, *versus* Bailey.

Wednesday
12 Nov. 1766.

THE COURT made a Rule, "That where they give *Leave to compound a Penal Action, the *King's Half* of the Composition, shall be paid into the Hands of the Master of the Crown-office, for the Use of his Majesty.

* V. 18 Eliz.
c. 5. s. 3 &
4. made per-
petual by 27
Eliz. c. 10.

Gulliver, on the Demise of Ambrose Corrie, Clerk; and also on two several Demises of the same Person by the Name of Ambrose Wykes, Clerk; *against* Shuckburgh Ashby, Esq. and Others.

Friday 14th
Nov. 1766.

THIS was a special Case in Ejectment. The Cause came on to be tried at the last *Lent-Assizes* for the County of *Northampton*, before Mr. Justice *Rates*; when it was agreed, by Consent of the Parties, that although a Verdict was found for the Plaintiff, on the last Demise, it should be subject to the Opinion of this Court upon the following Case.

William Wykes, Esq. being seised in Fee of the Estate in Question, (subject only to a Mortgage of Part thereof,) on the 15th of *August* 1736, made his last Will in Writing duly executed and attested; whereby He devised (amongst other Things,) in Case He should die without Issue, that, after the Death of his Wife, the Premises should go to his Sister *Dorcas Wykes*, for Life; and after her Decease, unto his Nephew *Ambrose Saunders* and the Heirs Male of his Body lawfully begotten, and the Heirs Males of their Bodies lawfully begotten; and for Want of such Issue, unto the Heirs Male of the Body of his Sister *Dorcas*

Wykes, and the Heirs Male of their Body lawfully begotten; with Remainder, to his Wife and Nephew's Godson *Ambrose Corrie* (the Lessor of the Plaintiff) and the Heirs Male of his Body lawfully begotten, and the Heirs Male of their Body lawfully begotten; Remainder, to the Heirs of the Body of his Nephew *Ambrose Saunders*; Remainder, to the Heirs of the Body of his Sister *Dorcas Wykes*; Remainder, to his Kinsman *Robert Ekins*, and the Heirs Male of his Body in Tail Male; Remainder, to his own right Heirs for ever: " PROVIDED always, and this Devise is expressly upon *this Condition*, that " whenever it shall happen that the said Mansion-House and " said Estates, after my Wife's Decease, shall descend or come " unto *any* of the Persons herein before named, [that] the Person or Persons to whom the same from Time to Time shall " descend or come, [that He or They] do or shall *then change* " *their Surname*, and *take upon them and their Heirs* the Surname " of *WYKES only*, and *not otherwise*." But, in *this* Proviso, there is NO *Devise over*.

Yet there is another Proviso (which immediately follows) prohibiting *Waste*, without the Consent of the Person to whom the Premises *shall next come*; and in this latter Proviso, there is a *Devise over* to the Person who is or shall be next intitled to the Premises expectant upon the Death of the Waster, of such *Part* of the Estate upon which Waste shall be committed or suffered: And so, *toties quoties*, on every committing or suffering Waste by the Person in Possession, without such Consent as aforesaid.

On the 9th of *May* 1742, the Testator died without Issue; leaving his Sister *Dorcas Wykes*, Spinster, and *Ambrose Saunders*, (the only Son of *Sarah Saunders*, his other Sister, then deceased,) his *Co-Heirs*: And his Widow entered upon the Estate, and enjoyed it till her Death. And upon her Death, which happened on the 16th of *January* 1747, his Sister *Dorcas* entered, and enjoyed till 16th of *December* 1756; when she died without Issue; and *Ambrose Saunders*, who was *then* the Testator's sole Heir at Law, entered, and enjoyed till 8th of *October* 1765; when He died, without Issue; and the Defendant *Shuckburgh Ashby* entered, and has (together with the other Defendants, his Tenants,) been in Possession ever since.

On the 8th and 9th of *February* 1759, the said *Ambrose Saunders*, being in Possession, executed Indentures of Lease and Release, and became Vouchee in a Common Recovery, which was suffered in the *Easter* Term following: But NEVER CHANGED HIS NAME of *Saunders*, nor took upon him the Surname of *Wykes*.

On

On the 17th of *January* 1766, the Lessor of the Plaintiff entered, for *Breach of the Proviso*, by *Ambrose Saunders's* not taking the Name of *Wykes*.

It appeared upon the Trial, that *Ambrose Saunders*, by Indenture dated 26th *October* 1757, had mortgaged Part of the Premises in Question.

The Question was, “ Whether, on the Case above stated, the Plaintiff was intitled to recover, in this Ejectment, such Parts of the Premises mentioned in the Declaration as are not comprized in the said Indenture of 26th of *October* 1757, or any Part thereof.”

This Case was argued twice: first, by Serjeant *Glynn* for the Plaintiff, and Serjeant *Leigh* for the Defendants; and the second Time, by Mr. *Hill* for the Plaintiff, and Mr. *Blackstone* for the Defendant.

Serjeant *Glynn* and Mr. *Hill* argued that the Plaintiff *has* a Title to recover; both upon the general Rules of Construction, and legal Authorities; and to effectuate the Intent of the Testator.

They endeavoured to shew, that the Proviso “ to take the “ Surname” operated as a *conditional Limitation*, NOT as a *Condition*: And therefore the Lessor of the Plaintiff’s Title accrued *before* the common Recovery was suffered.

They previously discussed the legal Notion of a *Condition*, and of a *Limitation*; and cited *Co. Litt.* 201. *a. b.* 214. *b.* 215. *a. b.* and said that Conditional Limitations differ from Conditions subsequent; and have different Properties. 2 *Salk.* 570. *Page* versus *Hayward.* 1 *Vent.* 202. The Lady *Ann Frye’s* Case.

Wherever the Estate determines by way of Limitation (though a collateral or conditional Limitation (it will go over to the next Person appointed to take, without any Devise over: But if the Condition or Limitation is annexed to an Estate of Fee-simple, then it will go to the Heir (either general or special;) unless there be a Limitation over.

Wherever several Estates are devised one after another, if any of the preceding Estates become void, the next Remainder-man shall take, though there be no express Devise over.

A Remainder *vested* cannot be *divested* by the Determination of the preceding Estate: And consequently, it must take Effect immediately. 2 *Co.* 51. *a.* Sir *Hugh Cholmley’s* Case. 2 *Bulstr.*

425. *Roberts* versus *Roberts*. 3 *Lev.* 437. *Duncomb* versus *Duncomb*. *Perk.* § 567. *Bro. Devise* 4.

There is no Distinction between Remainders depending on Estates Tail, and Remainders upon Estates for Life. Where the Devisee in Tail dies or refuses, the next in Remainder shall take. In Proof of which, they cited *Cro. Eliz.* 423. and the Case of *Goodright* versus *Wright*, 1 *Strange* 25. and that of *Goodright* versus *Cornish*, in 4 *Mod.* 255. and 1 *Lord Raym.* 3. and 1 *Salk.* 226. S. C. where the Court held, "that if the Remainder to the Heirs Male of *John Knowling* was void in Point of Limitation, then the next Remainder limited to *Richard* took Effect presently."

And there is no Difference, in Point of Reason, where the Estate Tail is *originally void*, and where it determines by Matter *ex post facto*.

An Authority precisely to the Point is *Rudball* versus *Milward*, *Moore* 212. *M.* 27 & 28 *Eliz.* (at which Time a Condition to restrain a Discontinuance was, and perhaps is *now* holden to be good; though a Condition to restrain a Common Recovery is not so.) It was determined, "that *William Rudball* was enabled to take Benefit of the Breach, whether it was a Condition or Limitation." And Lord Chief Justice *Hobart* says, in the Case of *Sheffield* versus *Ratcliffe*, (Page 346.) "that by the Cesser of an Estate-Tail, it accrues to Him in Reversion."

So that wherever the precedent Estate-Tail becomes absolutely void before a Discontinuance, the Estate shall not totally fail; but the next vested Remainder shall take Effect. And Estates Tail are only barrable by Common Recovery; or discontinuable by Fine or Feoffment.

They argued secondly—That here, *Saunders's* Estate became void; and the Plaintiff's Remainder was let in. This, they said, was the INTENTION of the Testator; which is to be supported, if it can be so by the Rules of Law. And they observed, that a Testator is not confined to technical Terms.

This Proviso operated as a *Limitation* to the Devise to *Saunders*.

The three first Devises (after that to his Wife) are in Tail-Male: *Provided* "that the Person or Persons to whom the Estate shall come, [He or They] shall *change* their Surname, and *take and use* the Surname of *Wykes* only, and *not otherwise*."

THIS *Proviso* operated as a Limitation to the Devise to *Saunders*; and extends to all the Devisees.

The *whole* Will is to be considered as *one Act*: It was equally the Testator's Object, "that *Saunders* should take his *Name*, as that "He should take his *Estate*." The former was indeed the Testator's *primary* Intent: And He meant this as a *Limitation*. And the Devisee ought not to retain the Estate, unless He performs the Condition, or *conditional Limitation*; which were the same Thing in the Idea of the Testator: For He could not mean it as a *Condition*, in the *strict, legal* Sense of that Word; because *Saunders* was his Heir at Law. And they cited *Cro. Eliz.* 204. *Wellock* versus *Hamond*, and *Cro. Jac.* 56. *Curteis* versus *Wolverston*, to prove this to be a Limitation. The former of these two Cases, namely, that of *Wellock* versus *Hamond*, is also in 2 *Leon* 114. and 3 *Co.* 20. *b.* (cited in *Boreaston's* Case:) But Mr. *Hill* cited it from *Cro. Eliz.* 204. The Word "paying" was construed a Limitation, and not a Condition: "And, being "a Limitation, the Law shall construe it, that upon Nonpayment his Estate shall *cease*; and then the Law shall carry it "to the Heir by the Custom, without any Limitation over." He observed that the Case in *Dyer* 317. mentioned in 3 *Co.* 21. *a.* should be 316. *b.* *pl.* 5. (As it certainly should.)

A Condition can only go to the Heir at Law. But the Customary Heir came in there, as upon a *Limitation*.

So here, the Remainder-Man shall come in, upon the Breach of this Conditional Limitation; as the Proviso must operate by Way of *Limitation*. The Heir at Law can't take, till all the Limitations are spent. This is a Devise over, by *Implication* at least, if not in express Terms. But

Thirdly—If it be still objected, "that the Testator has *not* "devised over in express Terms, upon Breach of this Condition."

They answered, that it was not necessary for him to keep to exact and technical terms; even if He had, in this Case of not taking his Name, the same Intention of the Estate's going over, as He has expressly directed in the Case of Waste: And in that Case, He has only given over the mere *Place wasted*; not the whole Estate.

As to any Objection that may be raised from no *particular Time* being fixed upon, at which the Condition may be said to be broken—The Answer is, that "it was broken before the "Common Recovery was suffered." The Common Recovery

came too late. *Page* versus *Hayward*, 2 *Salk.* 570. and *Pigott* on Common Recoveries 175. *Benson* versus *Hodson*. 1 *Mod.* 111. The same Objection might have been made, if the Estate had been expressly devised over, in Case of a Breach of this Conditional Limitation.

It is sufficient, that we shew a Non-performance of the Condition, at the Time of *Ambrose Saunders's* coming to the Estate; and that He lived *near nine Years*, and yet *never* changed his Name, nor took the Name of *Wykes*. They shew no Performance at *any* Time: which should come on *their* Side, if there was any Pretence of a Performance at all.

Therefore they prayed Judgment for all the Premises, except that Part that was in Mortgage.

Serjeant *Leigh* and Mr. *Blackstone* argued on Behalf of the Defendant; and principally insisted on the *Intention* of the Testator: which does by no Means support or consist with their Notion of a Conditional Limitation; or *Implication* of a Devise over, in order to effectuate the Testator's Intention.

This Devise can only be considered either as a Condition precedent, or a Condition subsequent.

In fact, it is only a Condition *subsequent*. And a Condition subsequent cannot be taken Advantage of by a *Stranger*, (as the Lessor of the Plaintiff here is;) but only by the *Heir at Law*. And it is barrable by a Common Recovery, according to the Opinion of *Hale*, in 1 *Mod.* 110, 111. *Benson* versus *Hodson*.

Where a Testator devises over, it can not go to the Heir at Law. 1 *Ventr.* 199. 203. *Porter* versus *Lady Ann Fry*. *Carter* 171, *Rundale* versus *Eeley* and Others: And there are some other Cases of Conditional Limitations; and where the Condition would become extinct by the Descent to the Heir upon Breach; as in the Case of *Wellock* versus *Hammond*. But the present Case does not fall within that of *Wellock* versus *Hammond*. That was holden to be a *Limitation*: This is a *Condition*.

In *this Proviso*, there is *no Devise over*. In the *next*, there is: Namely, in Case of Waste; in which Case, the Person is to forfeit to the next Taker. But the Waster is to forfeit only the *Locus vastatus*. And this second Proviso is very properly worded.

Therefore, 1st. The Testator knew *how* to limit over, when he judged proper to do so: And 2^{dly}. He did not intend or suppose

pose that the *whole* Estate should go over, *without* a Devise over; because, in the Case of Waste, He gives *only* the *Locus vastatus*.

And no Argument can arise from *Ambrose Saunders's* being Heir at Law to the Testator; because, in Fact, *Ambrose Saunders* was not *sole* Heir at Law, at the Testator's Death: *Dorcas Wykes* was *then* Co-heir with Him. And if it is a conditional Limitation *now*, it must have been so at the Time of the Testator's Death. But it was not so *then*; nor can it be made so now, by a *subsequent* Event.

The Testator meant, that the Estate should pass *entire*: He did not intend that the Estate-Tail should be defeated by the Fault of the first Taker. The Case of *Jermyn and Arscot*, in 4 *Leon.* 83. 1 *Anderson* 186. 2 *Anderson* 7. *Moore* 364. and 1 *Rep.* 85. (in *Corbet's* Case) proves "that the Estate-Tail cannot be defeated in *Part*, and remain in *Part*."

The Law will not raise such an Implication as this, upon an Estate-Tail. *Wellock* versus *Hamond* (which is the only Case of an Heir by Custom taking Advantage of the Breach) was a Fee; and was a Devise of the *whole* Fee. And *Cro. Eliz.* 205. is express, "that, *being a Limitation*, the Law shall construe it, that "upon the Non-payment of the Money, his Estate shall cease; "and then the Law shall carry it to the *Heir by Custom*, without any Limitation over." In the Case of *Skirne* and *Dame Bond*, in 1 *Ro. Abr.* 412. Title Condition, *pl.* 6. It was resolved "that if a Man devises Land to Another in *Tail*, upon Condition that he shall not alien; and that if he dies without "Issue, it shall remain over to Another in Fee; and after, the "Devisee aliens; yet he in Remainder can not enter for the "Condition broken; but the Heir at Common Law: For this "is no Limitation, but a Condition."

Though it might have been construed a Limitation, if it had been annexed to an Estate in Fee; yet when it is annexed to an Estate-Tail, it shall be construed a Condition, for the sake of the Issue. *Dorothy Wykes* might have left Issue: And they ought not to have been deprived of their Moiety.

The Case of *Rudball* versus *Milward*, in *Moore* 212. is a confused Note: Nothing can be collected from that Report, "whether it was a Condition, or a Limitation." But *Savil* 76. S. C. explains it, and shews clearly "that it was a Condition, "and *not* a Limitation."

Thomas's Case, in 1 *Ro. Abr.* 411: Title "Condition or Limitation," *pl.* 1. and 843. Letter L. *pl.* 1. is in point: And that

that was determined five Years subsequent to the Case of *Wellock* versus *Hamond*. It was a Devise to his Daughter in *Tail*, with divers Remainders over: *Provided* "that the Daughter and every " One in Remainder should permit and suffer T. (who then occupied the Land) to enjoy it during his Life." This is *not* a Limitation; though the Daughter was Heir General, and so was Herself to have the Advantage of the Condition, if it be a Condition: Notwithstanding which, it was holden to be a *Condition*.

And these two Cases are reconcileable, *only* by the Distinction between being in *Fee*, and in *Tail*.

Therefore they concluded that no Limitation shall be raised in the present Case, by *Implication*.

But even *supposing* that it might be construed as a Conditional Limitation—Yet, 1st. There is *no Breach*. 2dly. If there was, the Lessor of the Plaintiff could not *take Advantage* of it.

First—The Person required to change his Name had his *whole Life-time*, to take the Surname of *Wykes*. And as an Authority for this Assertion, they cited *Bothie's Case*, in 6 *Rep.* 30, 31. And in 4 *Leon.* 305. Case 425. it was agreed by all the Judges, "that Conditions which go in Defeazance of an Estate are *odious* " in Law; and no Re-entry shall in such Case be given, unless " the Demand be precisely and strictly followed."

The Words "not otherwise" in this Proviso only mean "*No other Name.*"

The taking the Name of *Wykes* was of no Benefit to any Body: And the Devisees are *not fixed* to a *particular Time*. Therefore the Condition is not broken, if the Possessor of the Estate takes the Name at *any Time* during Life.

Ambrose Saunders was Heir at Law for Half. The Court will not presume Him conscious of the Will and Proviso. However, it certainly was not necessary for Him to do it *instantly*: He must, at least, have convenient Time. And *convenient Time* is during the *whole Life* of the Taker; it being left *indefinite*; and no Benefit accruing to any Body by his taking the Name.

Consequently, *Ambrose Saunders* had a good *Estate-Tail* in *Him*, at the Time *when* He suffered the Common Recovery; and thereby acquired a Fee. 1 *Mod.* 111. *Benson* versus *Hodson*, 1 *Salk* 570. the fourth Adjudication in *Page* versus *Hayward*.

In that Case of *Page* versus *Hayward*, 2 Salk. 570. reported also by Mr. *Pigott* in his Treatise of Common Recoveries, page 175. the Condition was—"to marry a *Searle*;" and *Mary Bryant* had actually married another Man: Yet, still, there was a possibility of her performing the Condition. But it was resolved, that if it had been—"Provided and upon Condition that if She marry any but a *Searle*, it shall then remain" and be to J. S. and his Heirs;" a Common Recovery suffered before Marriage would bar the Estate-Tail and Remainders: And though She after marry with Another, it shall not avoid the Recovery.

Secondly—But even admitting that it was a Conditional Limitation, and that *Ambrose Saunders* ought to have taken the Name presently; yet the Lessor of the Plaintiff can have no Right to recover. For, upon a Limitation, the Estate ceases, without Entry or Claim: And the Law casts it upon the Party to whom it is limited. To prove which, they cited *Moore* 633. *Anthony Mildmay* versus *Humphrey Mildmay*. *Carter* 171. *Sir William Jones* 58. *Walter Foy* versus *William Hyrde*. *Co. Litt.* 214. b. 10 Rep. 40. and 2 Mod. 7.

Therefore, upon their own Principles, *Corrie* ought immediately to have taken the Name of *Wykes*: And so on. So that at the last, by a Circuity, it would come round again to *Ambrose Saunders*, the Heir at Law.

But *Ambrose Corrie* did not enter and take the Name. So that He is under this Dilemma; That either the Estate of *Ambrose Saunders* did not cease upon *Saunders's* not immediately taking the Name of *Wykes*; or (if it did) then his own Estate must have ceased, upon his not having immediately taken the Name of *Wykes*; and the Person next in Remainder must take. So that, either Way, he could have no Title.

Even at the Time of his bringing the Ejectment, He had not taken the Name of *Wykes*, and *Wykes only*. For, One of the Demises is by the Name of *Ambrose Corrie*; though the other two call Him *Ambrose Wykes*: So that He did not take the Name of *Wykes only*. Now the Estate and the Condition must vest together. If He was in by Relation, He ought also by Relation to have taken the Name of *Wykes only*.

Therefore *quacunque Via datâ*, he has no Title to recover, in this Ejectment.

In Reply—The Counsel for the Plaintiff endeavoured to support their former Grounds of the Lessor's Title; and to answer the Objections that had been made to it.

Their Argument consisted of two Parts; 1st. That the Proviso ought to be construed as a *Limitation*; 2dly. That an *implied* Devise to the Plaintiff appears upon the Face of the Will.

They argued, that this Proviso ought not to be construed as a Condition subsequent, but as a *conditional Limitation*; both according to the Rules of Law, and according to the Intention of the Testator: And consequently, the Heir at Law shall not take, on Breach of it; especially, as He was here the very Person who broke it.

As to the Case of *Porter* versus *Frye*, (*Lady Ann Frye's Case*) 1 Vent. 202. that, they said, was a Restraint on Marriage: And whenever the Condition is in Restraint of Marriage, it will fail, unless there be a Devise over*; as in the Case of *Hervey* versus *Aston*.

*Lord Mansfield said, that was a Condition precedent; and therefore the Estate never vested. And in Chancery it is held, "that subsequent Conditions of Forfeiture in Restraint of Marriage are only meant *in terrorem*; unless there is a Devise over."

And in Chancery it is held, "that subsequent Conditions of Forfeiture in Restraint of Marriage are only meant *in terrorem*; unless there is a Devise over."

Where the Heir at Law is the only Person that can take a Benefit by the Breach, it is a conditional Limitation: Because it would be nugatory "to construe it a Condition." And here *Ambrose Saunders* was sole Heir at the Time of the Recovery suffered: Therefore it would be nugatory, if construed as a Condition.

The Testator meant the Estate and the Name to go *all* together; not in Moieties of the Estate. And it was certain that *A. S.* would become sole Heir, whenever *Dorcas* should die without Issue. Besides, *Dorcas Wykes* and *Ambrose Saunders* were but One Heir: And it was an *entire Descent* to Both. And it must have been an *entire Entry* for the Breach; and not in Moieties. *Eastcourt* versus *Weekes*, 1 Lut. 802. One Co-parcener cannot enter for Self and the other Co-parcener. No Entry can be for a Moiety: They are but One Heir.

† Brooke, Coperceners, pa. 179. pl. 8.

There is a Difference between Parceners by *Custom*, and Parceners by *Common Law*. The Latter are considered as *One* Representative of the Deceased: The Former, as *Several*; Each as to his respective Part.

As to Provisoes tending to restrain Alienation by Tenant in Tail—They said, that an Attempt to introduce Perpetuities shall

shall never prevail. They agreed, that a Limitation can not make *Part* of the Estate cease, and not the Rest: And consequently, they admitted, that if this Estate ceased as to *Ambrose Saunders*, it also ceased as to his Issue. But they argued, that it is no Hardship upon the Issue of *Ambrose Saunders*. In Support of which they cited what was said by Lord *Parker*, in the Case of *Goodright* versus *Wright*, in 1 *Stra.* 32. in Answer to the Supposition of Hardship upon the Issue; who were not in being at the time of that Devise. And in the Case at Bar, *Ambrose Saunders* had no Issue at the time of the Devise. Therefore the Issue of *Ambrose Saunders* could not be the *Primary* Object of the Testator's Regard; and the Remainder-Men only secondary Objects of it. They insisted, that this Breach of the conditional Limitation makes a total Failure of inheritable Issue: And therefore is the same as if there were none at all.

As to *Ambrose Saunders's* having Time during his whole Life, to take the Name of *Wykes*—Here is a Time expressly limited: “Whenever the Estate should come to the Taker,” he was then to take the Name of *Wykes*.

But if it had not been particularly limited, yet it ought to have been done as soon as it could conveniently be done. Whereas this Recovery was above two Years after the Estate came to Him: And He never took the Name; not even upon the Recovery itself. Therefore He forfeited, on not doing it immediately, or at least as soon as conveniently might be.

As to *Hales's* Opinion, in 1 *Mod.* 111. and the Case of *Page* versus *Hayward*—They go upon the Supposition “that the Condition was not at that time broken.” But here it was broken, at the Time when the Recovery was suffered.

As to the *Lessor of the Plaintiff* not taking the Name immediately, Himself—He was not to take it till He came into Possession. He has never entered. He was not to take the Name without the Estate. He took it as soon as He claimed the Estate.

As to the Proviso against Waste being explicit in giving over the Place wasted—Though that second Proviso is indeed more explicit than the former, yet the Proviso now in Question contains a very strong Implication: And all the Words of this Will can not be satisfied, unless this Implication be made. Therefore such an Implication shall be made upon this first Proviso.

LORD MANSFIELD, after stating the Case, observed that the only Foundation of the Plaintiff's Title is, “that the *Estate-Tail* “was to cease upon *Ambrose Saunders's* not taking the Surname of “*Wykes*;

“ *Wykes*; and that, for Want of his taking such Sirname, it
“ *went over to the next in Remainder.*”

The whole of this Case is a Question of *Construction*; provided the Intention of the Testator be not contrary to Law.

With a View to effectuate the Intent of the Testator, it is certain that a Condition *may* be construed into a Limitation. And there is Nothing plainer than the *Principles* upon which the Case of *Wellock* versus *Hamond* was determined; “ that it must be
“ understood in the Nature of a Limitation, when the Estate to
“ to which the Condition stands annexed is given to the *Heir at*
“ *Law*: Because, in Case it were a *Condition*, it would descend
“ upon the Heir *Himself*, and extinguish in Him; and there
“ would be no Remedy for the Breach of it.”

But then that Case goes on, and determines directly contrary to the Intent, “ that the Law shall carry it to the Heir by the
“ Custom, without any Limitation over.”

In that Case, the Money was to be paid by the Eldest Son to his Brothers and Sister, within two Years after the Death of the Testator's Wife. He did not pay it within two Years: But he paid it within five Years.

And at a Distance of Time, the Court determined “ that the
“ *Heir by the Custom* should take Advantage of the Breach *.”
• V. ante
1934. That certainly, was contrary to the Intention of the Testator: For He only intended “ that the Heir at Law should have it as a
“ *Pledge.*”

In the present Case, his Lordship held—

First—That this is *not* a Condition *precedent*. It can't be complied with, instantly. It is “ to take the Name for themselves and *their Heirs.*” Now many Acts. are to be done, in order to oblige the Heirs to take it: such as a Grant from the King; or, an Act of Parliament. It is not, therefore, a Condition *precedent*; but being penned *as* a Condition, it must be a Condition *subsequent*. It can't be a *Limitation*: For, the next Proviso (against Waste) shews that the Testator knew how to limit over, when he thought proper to do so. And in *that* Case, he did think it proper to do it: And therefore *that* Proviso is turned into a Limitation.

As to any *Implication* of a Limitation upon the first Proviso—The Court can not intend or imply what does not appear to be the Testator's Intention. And no such Intention of the Testator

tor appears in this Case: Rather the Contrary. And yet it is said, "that the *Estate Tail* shall *cease*; and it shall go over to "the next Taker, by Implication." But there is no Case or Authority produced in Support of such Implication. The Case of *Skyrne* versus *Bond*, and *Thomas's* Case, are, Both of them, contrary to it.

A Condition annexed to an *Estate Tail* can never be meant to be compulsory: Because the Testator must know, that the Tenant in Tail could bar it the very next Term. Therefore this Condition could not be intended by the Testator to be compulsory, so as to bar the *Estate Tail* which he had given to *Ambrose Saunders*.

On *this* Will, it is clear that the Testator did *not* mean the *Estate Tail* to cease: For, the Condition is imposed *personally* upon *every* Heir—"The *Person* or *Persons* to whom the Estate "shall from Time to Time descend or come." Therefore the Testator meant to pass over *only* the particular *Person* breaking the Condition, and to impose the Forfeiture upon Him or Them *personally*; but never meant that the *whole Estate-Tail* should cease.

Now it is a Limitation void in Law, "that an *Estate-Tail* "shall cease in *Part*, and not in the *Whole*." The Case of *Fermyn* and *Arscot* * is in Point. It would be a Limitation * V. ante 1935. void therefore in itself, even if it *could* be implied.

It is not necessary to inquire whether the *Heir* at Law can take Advantage of this Condition, or not: It is enough, that the *present Plaintiff* can not claim. It is plain to Me, that He can not: And I am clear that the Testator had no such Meaning as has been suggested and supposed on the *Part* of the Plaintiff.

As to the Question, "Whether the Condition was broken, or "not"—In such a Case (of so silly a Condition as this is,) the Court would perhaps incline against the Rigor of the Forfeiture. But as to *this*, I give *no Opinion*; nor upon Mr. *Blackstone's* ingenious Conceit of the Plaintiff's not having taken the Name, and therefore having *Himself* forfeited. The Plaintiff, who insists so strictly upon this being a Forfeiture of the Estate, has certainly no Pretence to any *Favour* from the Court. However, in this Case, there is no need to meddle with the Question about the Forfeiture: For the Recovery was *well* suffered; and therefore the Plaintiff has no Title.

Mr. Justice *Yates*—This is certainly not a Condition *precedent*.

The Question then is, “Whether it be a *conditional Limitation*? I am clearly of Opinion, It is *not*. Doubtless, 'tis *not an Express Limitation*: And an *Implication* of One can only be made, in order to *effectuate* the Testator's Intention; and must be a *necessary Implication* to that Purpose.

Now this would *not* be so. Exclusive of this Recovery, All the devises would take effect according to the Testator's Intention, *without* such an Implication. And the Court will not make an Implication, to support an *idle* Intention, beneficial to No-body: Nor shall Such an Implication be made upon a Limitation after *Estates-Tail*.

* V. ante
1932.

Mr. *Hill* cited the Case of **Rudball* versus *Milward*, (in *Savile* 76. and *Moore* 212. But that Case does not come up to a Limitation after an Estate-Tail †.

† Note. Lord
Mansfield had

observed, at the End of Mr. *Hill*'s Argument, “that *Rudball v. Milward* was a hard Determination; that “there was no implied Limitation; and that the Remainder was to the Heir at Law, who was to take the “Advantage of the Breach of the Condition.”

If this was to be construed a *conditional Limitation*, it would strip the *Issue* of *Ambrose Saunders*; and consequently defeat the Intention of the Testator: He never meant to exclude *them*. And yet it is urged “that they should be excluded †.”

† V. ante
1939.

It cannot, therefore, be considered as a *conditional Limitation*. Nor is it a *Condition* subsequent: For, it would be nugatory; as *Ambrose Saunders* might immediately suffer a Common Recovery, and bar the Estate. It can only *operate* as a *Recommendation* or *Desire*. And this is the stronger, by Reason of the *express* Condition annexed to the second Proviso; (notwithstanding that it is an ineffectual One.)

Mr. Justice *Aston*—Whether this be a Condition, or a Recommendation; yet the Rules of making Implications do not hold in the Case now before Us. The Cases cited in Support of making the Implication are founded upon Reasons which do not exist in the present Case.

I take it to be a Condition subsequent; and, as such, barred by the Common Recovery.

The Case of *Rudball* versus *Milward* is best reported in *Savile* 76. That was considered as a Condition; and not a Limitation.

Limitation. And that is agreeable to *Thomas's Case* in 1 Ro. Abr. 411.

The Implication contended for, in the present Case, is contrary to the manifest Intention of the Testator; who never meant that the *Estate-Tail* should cease on a Breach of the Condition mentioned in the *first* Proviso. He certainly meant that the Issue in Tail should take, in Case of a Breach, upon the *second* Proviso. For the "Person to consent to the Waste," was *the Issue in Tail*: It was not meant to *exclude* Him. He agreed to the Observation, "that the Case of *Jermyn versus Arscot* seems "to make this Condition void*." He inclined to think that * V. ante, *Ambrose Saunders* had his *whole Life* for taking the Name. He 1935, 1941. concurred in Opinion, with Lord *Mansfield* and Mr. Justice *Yates*, "that the Lessor of the Plaintiff had no Title."

Mr. Justice *Hewitt*—If this be considered as a Condition, it is collateral and subsequent, and would be destroyed by the Recovery.

Such a Proviso as this is, shall operate as a Limitation, where there is a Devise over; and also in *some* Cases where the Devise is to the Heir. The Latter is an implied conditional Limitation: And this Case must be of that Sort, if it were a Limitation at all.

But here the Intention of the Testator appears to be contrary to such Implication. Such an Implication would defeat the Issue: Whereas He *intended* that they should be the next Takers, in Case of a Breach; not, that they should *suffer* by it.

However, there is no Authority that such an Implication of a Devise over can be made, after a Devise in *Tail*.

Wellock versus *Hamond* was a Devise of a Fee. And if it had been construed a Condition, it must have descended to the Eldest Son upon his own Breach of it.

Rudball's Case seems rather to have been considered as a Condition, than as a Limitation. However, 'tis no Authority in the present Case.

In the Case of *Jermyn* versus *Arscot*, the Proviso was repugnant: It could not take Effect, by Law. The Estate was "to cease, as if the Tenant in Tail Male was naturally dead. But "the mere Death of such a Person does not determine his "Estate. It must be a dying without Issue Male†." So, here, † 1 Co. 86. a. a like Repugnancy would follow upon a like Construction.

As

As to its being only a *Recommendation*—I find no Case in the Books, about *Recommendations*: And I shall not enter into the Question “Whether this is to be considered as a *mere Recommendation*, or as a *Condition*.”

Thomas's Case in 1 Ro. Abr. 411, 843. seems in Point. If that was a *single Heir*, that Case is in Point: If not, *One Co-Heir* may * enter *for Both*. And no Advantage was here taken of the Condition, *before* the Recovery was *suffered*.

*V. Bro. Abr. Copencens, 3.

He concluded with saying, that this Condition, or whatever else it may be called, is not such a Limitation as will carry the Estate *over* to the next Remainder-Man, upon Breach of the Condition enjoined: And therefore the *Plaintiff*, who is that next Remainder-Man, and only claims as being so, can have no Title to Recover.

Per Cur'. unanimously—

Let the *Postea* be delivered to the Defendant.

Monday 17th
Nov. 1766.

Howe, Esq. *versus* Nappier.

A Prohibition had been moved for, to the Court of Admiralty, in a Suit there for Seamen's Wages; upon a Suggestion “that it was by *Deed executed*.” It was upon an *East India* Company's Charter-Party: Which are always (as it was said) under Seal.

† Sect. 1.

On the last Day of last Term, Mr. *Dunning* shewed Cause against the Prohibition; and alledged, that these Contracts used to be *without Deed*: But by 2 G. 2. c. 36. it was provided that they should be *in Writing*, declaring the Wages, and expressing the Voyage. That Act says—“The Agreement shall be *made in Writing*†.” But it did not intend to deprive the Sailors of the Benefit of suing in the Admiralty-Court; where they could obtain their Wages in a more summary and expeditious Method, than in the Common-Law Courts.

Sir *Fletcher Norton* and Mr. *Walker*, *contra*, argued for the Prohibition; and urged, that the Admiralty-Courts have no Jurisdiction, where the Contract is *under Seal*. 2 Sir J. S. 968. *Day et al' versus Searle*. 1 Salk. 31. *Opy versus Addison*. [V. 12 Mod. 38. S. C.] 1 Ld. Raym. 577. [See it also in 12 Mod. 405.] *Clay v. Snelgrave*. They proceed by a *different Manner of Proof*: They require *two* Witnesses; the Common Law, only *One*.

LORD MANSFIELD—It must turn upon the *Suggestion*:
You may move to *amend* that.

Whereupon, Mr. *Walker* made a Motion for that Purpose:
And a Rule was granted, to shew Cause why the Suggestion
should not be amended; and the present Rule was enlarged.

On *Friday* the 7th of this Month of *November*, Sir *Fletcher Norton* moved to make absolute the Rule for amending the Suggestion.

And accordingly, the Rule for amending the Suggestion was then made absolute: And upon the amended Suggestion, it was averred to be a Contract made *at Land*, (*viz.* at the *East India House*, &c;) and that it was *under Seal*.

And a Rule was made, at the same Time, for Civilians to be heard against the Prohibition.

Dr. *Marriott* now argued against the Prohibition, and *for* the Jurisdiction of the Admiralty,

He said He would lay down some first Principles.. One of which was, that

A Prohibition must be granted upon *good and legal Cause*.

He admitted that the Court of Admiralty could not hold Plea of Things arising by Deed, in cases where the Matter is to be *executed on Land*. They are restrained by the Acts of 13 R. 2. Stat. 1. c. 5. and 15 R. 2. c. 3.

It depends upon the *Nature of the Thing*; *not* upon the *Locality*.

They may hold Plea of *Contracts for Seamen's Wages*, generally. For, the Question is "Whether they have earned their Wages" or not, by the maritime Law:" That is the Point in Issue. The Contract comes in only *incidentally*, not originally. We do not pretend to determine upon Deeds, generally: But here it comes on only *demonstrative*. We can give the Mariners the most effectual Remedy, in Cases of Wages. We can send Commissions to examine Witnesses: Which foreign Courts of Admiralty will assist. Mariners may *join together* in suing, in our Courts. We examine our Witnesses upon Interrogatories: Which is convenient to Men of that vague Kind of Life. So

that they have certain and convenient Justice in the Admiralty- Courts.

The Cases where Prohibitions have been denied, on general Contracts for Seamen's Wages, are the following—*Wood* versus *Bonithorne*, Sir *Thomas Raym.* 338. Anonymous, 1 *Ventr.* 146. and *Wells* versus *Osmond*, in 6 *Mod.* 238. Where the true Reason is given, why Seamen may sue for their Wages in the Admiralty, though the Contract be at Land; namely, That there the *Ship* is made *liable* to them; and there they may *All join* in the Suit: Neither of which may be at Common Law; and yet much for the Ease of poor Seamen.

The first Question is, “How far the Admiralty may hold Plea of Contracts made *at Land*?”

Now 3 *Lev.* 60. *Coke* versus *Cretchett*, and *Middleton* versus *Scolly*, there also mentioned, prove that notwithstanding 13 R. 2. or 15 R. 2. the Admiralty have Jurisdiction to hold Plea of a Charter-party and Contract, though made at *Land*.

The next Question is, “Whether They can hold Plea of a *Deed*?” And then, “Whether this be a *Deed*?”

1st. The Court of Admiralty proceeds by the Common and Maritime Laws of *England*, as well as by the present System of Maritime Laws in all civilized Countries. The *Civil Law* pays Respect to a *Deed*. And the *Process* of the Admiralty is summary, and more expeditious and easy in its Method of obtaining Seamen's Wages: And more ample Justice may be done, even in the Case of a *sealed* Contract made at *Land*. Cases do not make Law: But Law makes Cases.

I suppose, the Counsel on the other Side will produce a Case out of *Salkeld*.

But a Case not founded on Principles is no Authority.

The Court of Admiralty are the proper and only Judges of the Service of Mariners. And here, the Whole of the *Libel* is the Hiring and the Performance.

The Suggestion is founded on the two Statutes of 13 R. 2. *Stat.* 1. c. 5. and 15 R. 2. c. 3.

The Black Book of the Admiralty, (N^o. 25. Letter C.) which is coeval with the Red Book of the Exchequer, supposes those
2 Statutes

Statutes to have proceeded from a turbulent Spirit. They have been the Grounds of Prohibitions to the Court of Admiralty.

Lord *Coke* laboured to abridge their Jurisdiction in his Writings. But at this Day, the Spirit of these Statutes will *not be enlarged*.

Therefore He hoped the Court would not put it in the Power of a Company (meaning the *East India* Company) to *oppress* their Seamen, by granting a Prohibition in the present Case.

The Litigation in the Admiralty-Courts is only *as to the SERVICE*.

Mr. *Dunning* also argued against the Prohibition.

The Wages being *earned on the High Seas* was the Principle, he said, of the Admiralty Jurisdiction: And the Case of *Opy* versus *Addison et al'*. in 1 *Salk*. 31. was the first Case to the Contrary; and seems not to have been much considered. Probably, *Bridgman's* Case, in *Hobart* 11. might be the Ground of that Determination.

The 2 *G. 2. c. 36.* directs indeed "that the Agreement shall be in Writing." But it did not mean to take away the Admiralty Jurisdiction, so convenient to Mariners. And surely the mere putting a *Seal* to the Agreement in Writing ought not to take their Jurisdiction away from them.

The Case of *Day et al'*. versus *Searle*, in 2 *Sir J. S.* 968. is only this—"The Mariners libelled on a Contract *under Seal*: "And a Prohibition was granted, on the Authority of *Salk*. 31. "Vide 3 *Lev.* 60. *contra*." Which Note of Reference to 3 *Lev.* 60. shews that that Case so referred to was not cited or considered in the Case of *Day* versus *Searle*.

Sir *Fletcher Norton*, *contra* for the Prohibition.

The Jurisdiction of the Admiralty ought not to be extended; if for no other Reason, yet for this One alone, it's being *summary*, and exercised by Persons appointed (as they were till very lately) by the Lord High Admiral, and without any Jury.

The Acts of 13 & 15 *R. 2.* ought to be construed with the greatest Latitude; and not with strict and narrow Limitations: For, they were very beneficial to the Subject; and were made "at the great and grievous Complaint of All the Commons,"
" of

“ of the Incroachments made by the Admirals and their Deputies, upon divers Jurisdictions, Franchises, &c.”

The Civil Law is the Corner-Stone of the Admiralty-Jurisdiction; the Hinge upon which it turns: They principally proceed upon *that* Law. These Statutes provide for the Common Law Jurisdiction upon Contracts made *at Land*; and take away their usurped Jurisdiction, both as to Contracts made *within the Bodies of Counties*, (as well on Land as Water,) and also Wreck of the Sea.

By 2 H. 4. c. 11. these Statutes were enforced, and double Damages given against the Pursuant in the Admiral's Court; and also a Penalty of 10*l.* to the King for the Pursuit so made.

The Court are *obliged, ex Debito Justitiae*, to grant this Prohibition: The Proceeding is *coram non Judice*. It is more than discretionary: The Court *ought* to grant it. These Acts of Parliament are to be encouraged, and not restrained.

They alledge a *false Fact* in their Libel, by laying the Contract to have been made *at open Sea*. We are not obliged to look for the Cause of Prohibition, in *their Libel*: The *Suggestion*, when true, is the Place to look for it. If the Suggestion be *false*, it is traversable; and Costs will follow.

Therefore it must be taken to be *true*. And the two Grounds laid in it, are 1st. That the Contract was made at *Land, viz.* at the *East India House*. 2^{dly}. That it was a Contract *under Seal*.

He admitted the Advantages the Mariner has by suing in that Court; and that the *Ship*, as well as Captain, are there liable. So, the Mariners may All *join*, in suing in that Court. But the examining their Witnesses upon Interrogatories, more than balances all those Advantages: *Vivâ Voce* Examination is greatly more advantageous to the Parties; at least, to the Captain and Owners. So also is the getting clear of the *Detention* of Ships of immense Value, at the Suit of a Common Sailor for his trifling Wages. The *East India Company* give high Wages, on Account of the Sailors not being intitled to any Wages at all, unless the Ship comes Home: And by this Contract the Sailor waves the Advantage He would have by the Marine Law, whereby He would be intitled to Wages as far as He has earned them *before*, though the Ship should be lost in coming Home. Upon *this* Contract, Service does *not* intitle to Wages: Therefore *that* alone is a sufficient Cause of Prohibition.

As

As to the Black Book of the Court of Admiralty—It would have no Weight in a Court of Common Law: More especially, if it forbids Lords of Manors to take Wrecks upon their own Manors.

As to the Case of *Coke versus Cretchett*, in 3 *Lev.* 60.—It must be very inaccurately stated: For, the Common Law Courts could not have denied the Prohibition, if the Contract was by deed.

On a Contract made *at Land*, the Court of Admiralty can not proceed.

As to a Contract by *Deed*—They require *two* Witnesses to prove it: *We* hold it a good Deed, where it is proved by *One* Witness only. But They are not trusted to hold Plea at all, where the Contract is *under Seal*.

The Case of *Opy versus Addison et al.* in 1 *Salk.* 31. is expressly in Point: And a *Special Agreement*, or it's being *under Seal*, so as to be *more than a Parol Agreement*, is laid down as the Ground of a Prohibition; where it takes the Case *out* of the *general Usage*. And I take it for granted that the Court then had the other Cases under their Consideration.

The other Case, *Day et al.* versus *Searle*, in 2 *Str.* 968. recognizes the Case in 1 *Salk.* 31. and likewise mentions the Case in 3 *Lev.* 60. which ceased to be Law, and therefore ought to be guarded against. The Note of Reference, added at the End of it, means, and is intended to shew, that the Case there reported by Sir *J. S.* was so determined, *notwithstanding* the former Case in 3 *Lev.* 60. which was not Law.

As to *Bridgman's Case*, *Hob.* 11.—I own it to be a mere *Dictum*.

Our Ground of Prohibition is “That the Admiralty has no Jurisdiction in Matter of Contract *at Land*; much less, if it be under *Seal*.”

Their Proceeding according to their Rules would be of the greatest Inconvenience to the *East India Company*, who always make special Contracts, adapted to their particular Circumstances.

Mr. *Walker* argued on the same Side, and to the same Effect.

Lord Mansfield—A Prohibition is *ex Debito Justitiæ*, if the Court of Admiralty proceed contrary to Act of Parliament. However, if I had any Doubt, I should take time to consider. These Statutes take away their Jurisdiction in *all* Cases of Contracts made *upon Land*: And yet their Jurisdiction has been allowed in Cases of Contracts made upon Land, with a Mariner “*to serve for Wages*,” in the ordinary and usual Way. There the Contract is only a Memorandum fixing the Rate, and ascertaining the Wages: But the *Service* at Sea is the principal Matter in Consideration. This has been permitted, for the Convenience of Sailors: The *Gift* and *Foundation* of the Action is the *Marine Service*. They do not, in their Demands there, state a Contract.

But the Cases in 1 *Salk.* 31. and 2 *Str.* 968. are express, “that where there is a *Special Agreement* by which the Mariners “are to receive their Wages in any other Manner than is usual; “or if the Agreement be *under Seal*, so as to be more than a “parol Agreement; in such Case, a Prohibition shall be “granted.”

The same Case of *Opy* versus *Addison et al.* reported in 1 *Salk.* 31. is also reported in 12 *Mod.* 38. The Suit in the Court of Admiralty was for Mariners Wages. The Suggestion for a Prohibition was “of a Contract *in Writing* made for them *at Land*.” The Court said, “that Nothing but constant Practice affirms the Jurisdiction which they allowed that the Court “of Admiralty has in such Case.” But they held that if there be a *Special Agreement* “that Mariners shall receive Wages in “any other Manner than usual;” or if the Agreement be *under Seal*; in both these Cases, Prohibition shall go. They added— “But where it is in *Writing only*, it is but a *parol Agreement*; “and therefore they have Power, as here.” Which seems nonsensical; and yet is easily explainable: It means no more than this; “that if the *common and usual Agreement*, generally made “by *Parol*, happens to be put into *Writing merely*, (without “Seal or adding any *Special Agreement*) it is no more than a “*Memorandum* of the Rate of Wages.”

The Case of *Day and Others* against *Searle*, in 1 *Strange* 968. is most express “that if the Contract is *under Seal*, a Prohibition shall be granted.” And the Note at the End of it, “*Vide* “3 *Lev.* 60. *contra*,” means “*notwithstanding* the Case in “3 *Lev.* 60. to the contrary.”

Here, the whole Merits may turn upon the Construction of the *Special Agreement*. However, the being *under Seal* is not the

the *only* Difference between this Contract, and *ordinary* Contracts for Mariners Wages.

Therefore We are *bound*, in my Opinion, to make the Rule absolute for a Prohibition.

The three other Judges concurred, that as this was a *Special* Agreement, and *under Seal* too, a Prohibition ought to be granted. And

Mr. Justice *Vates* thought the Usage of permitting Sailors to sue in the Admiralty for their Wages, was founded upon this Principle, "that where there is *no Special* Contract, their Reliance is on the Credit of the *Ship*; whether the Contract be *in Writing*, or *not*." In which Case they declare upon the *Service*; and the *Writing* is only given in *Evidence*. But it is otherwise, where they are obliged to declare *upon the Deed*.

Per Cur'.

Let the Rule for a Prohibition be made absolute.

Woolley and Another *versus* Idle.

Tuesday 18th
Nov. 1766.

THIS was an Action of Debt brought upon a By-Law by *Thomas Woolley* and *Henry Collins*, Masters of the Fellowship and Company of Merchant-Tailors within the City of *Bath*.

The Declaration states the Charter of that City, granted 32 *Eliz.* with a Power to the Mayor, Aldermen and Common-Council to make By-Laws; and their Acceptance of it; and that Time out of Mind, there had been a certain ancient Guild or Company, called the Fellowship and Company of Merchant-Tailors, of which there have been and still are Two Masters; and that there hath been Time immemorial an ancient *Custom* "That no Stranger-Person hath of Right used or exercised, or of Right ought to use or exercise the Craft or Mystery of a Taylor within the City aforesaid, except He be free of the said City." It then states a By-Law, made 12th *May*, 4 *C.* 1. which ordains "That no *Stranger* nor *Foreigner*, at any Time thereafter, should use or exercise the Craft or Mystery of a Taylor within the said City, except He should first be made *free of the said City*; under a *Penalty* of 3 *s.* 4 *d.* *per Diem*, to be paid to the Masters of the said Company of Merchant-Tailors for the Time being, to the Use of the Poor of the said Company." It then charges upon the Defendant, that He
having

having Notice of the said By-Law, and being a Stranger and Foreigner, had exercised the Craft and Mystery of a Taylor within the said City, on the 1st of *April* and two Days afterward, without being free of the City; and thereby forfeited to the Use of the Poor of the said Company the Sum of 3*s.* 4*d.* *per Day* for each of the said Days.

To this Declaration, the Defendant demurred, generally: And the Plaintiffs joined in Demurrer.

Mr *Fearnley*, for the Defendant, argued that this By-law was *void*; being contrary both to Common and Statute Law: And he insisted that the Custom stated did not support it; and was itself bad. He cited 5 *Mod.* 105. *Robinson versus Gros court.* 11 *Co.* 53. the Case of the Taylors of *Ipswich*; and *Cro. Eliz.* 803. the Corporation of Weavers in *London* versus *Brown*.

Mr. *Dunning*, *contra*, was ready to argue for the Plaintiffs—

But *per Lord Mansfield*—There is Nothing of Doubt in this Case. The Custom is good; and warranted by a vast Number of Cases. Therefore the Demurrer must be over-ruled.

Judgment for the Plaintiffs.

Roe, on the Demise of Henry Noden, *versus* George Griffiths and Elizabeth his Wife, and Charles Thomas and Mary his Wife. In Trespass and Ejectment.

THIS was a Special Case reserved at the last Summer-Affizes for the County of *Surry*; where a Verdict was found for the Plaintiff, subject to the Opinion of the Court upon the following Case.

Blackwell North being duly admitted, and seised in Fee of the Premises in Question, (being Copyhold of Inheritance, held of the Manor of *Ebbisham* in *Surry*,) in Consideration of a Marriage intended between Him and *Rachel Noden*, on 20th *April* 1724, surrendered the Premises by the Rod, into the Hands of the Lord of the Manor, by the Acceptance of the Deputy Steward thereof, (*Thomas Harris*,) to the Use of Himself, his Heirs and Assigns, till Solemnization of the Marriage; then to the Use of the said *Blackwell North* and his Assigns, for his own Life; then to the Use of the said *Rachel* and her Assigns, for her Life; then to the Use of Trustees, during the several Lives of the said *Blackwell North* and *Rachel*, upon Trust to preserve

contingent Remainders: And after the Deceases of *Blackwell North* and *Rachel*, and the Survivor of them, then to the Use of such Child or Children of the said *Blackwell North* on the Body of the said *Rachel* to be begotten, and for such Estate and Estates, and in such Manner Shares and Proportions, as the said *Blackwell North*, in his Life-time, by any Deed or Deeds, Writing or Writings, duly executed, and attested by three or more Witnesses, or by his last Will and Testament in Writing duly made and published, should limit direct or appoint; and for Want of such Limitation Direction or Appointment, and until such Limitation Direction or Appointment should be made, and until such Estate and Estates so limited directed or appointed, shall respectively commence and take Effect; and as such Estate or Estates, so limited directed or appointed, shall respectively end and determine, to the Use of the Heirs of the Body of the said *Blackwell North* on the Body of the said *Rachel* to be begotten; and in Default of such Issue, to the Use of the said *Blackwell North* and of his Heirs and Assigns for ever.

Soon after making the said Surrender, the said Marriage took Effect.

On 26th May 1725, at a Court then holden by the Steward, (*Dormer Parkurst*, Esq.) it is presented by the Homage, and attested by the said *Thomas Harris*, Deputy-Steward, and recorded and inrolled, "That on the 5th of April then last past, " the said *Blackwell North* surrendered by the Rod and by the " Acceptation of the Deputy-Steward, all his customary Messuages Lands Tenements Hereditaments &c, with their Appurtenances, &c, &c, to the Uses of his Will, in proper " Form."

On 27th April 1743, He made his Will; and thereby gave to his said Wife *Rachel* and her Heirs, All and singular such his Freehold and Copyhold Lands and Real Estates, with their Appurtenances, as He Himself, or any other Person or Persons in Trust for Him or to his Use, were or ought to be intitled to or interested in, in Possession Reversion Remainder or Expectancy; and all his Estate Right Title Interest Use Trust Inheritance Claim and Demand whatsoever, either at Law or in Equity, in to or out of the same, and every or any Part thereof; and also all his Chattels and personal Estate; and made Her his sole Executrix.

On 22d May 1751, it was, at a Court-Baron then holden by *Thomas Harris* the then Steward, presented by the Homage, and attested and inrolled, "That upon the 20th of April which was " in the Year of our LORD 1724, the said *Blackwell North*,
PART IV. VOL. IV. I " a Custo-

“ a Customary Tenant of the Manor, for and in Consideration
 “ of a Marriage then intended between Him and the said *Rachel*
 “ (his now Wife,) did surrender, by the Rod, into the Hands
 “ of the then Lord of the Manor, by the Acceptance of the
 “ said Steward, (then Deputy-Steward thereof,)” &c, &c; [set-
 “ ting out the said Surrender of 20th *April* 1724, *verbatim*, as be-
 “ fore stated; and also the Admissions of *North* and his Wife, in the
 “ Words following—]“ And afterwards, now also at this Court
 “ [22d *May* 1751,] the said *Blackwell North* and *Rachel* come
 “ in their own Persons, and humbly pray that they may be ad-
 “ mitted Tenants to the Lord, to all and singular the Premises
 “ above surrendered, with the Appurtenances, ACCORDING TO
 “ THE TENOR AND INTENT of the same Surrender. And there-
 “ upon the Lord, by his Steward aforesaid, and by the Rod,
 “ doth now at this Court grant to the said *Blackwell North* and
 “ *Rachel* respectively, the aforesaid surrendered Premises with
 “ the Appurtenances; To have and to hold the same unto Him
 “ the said *Blackwell* for and during the Term of his natural
 “ Life; and from and after his Decease, To have and to hold
 “ the same unto Her the said *Rachel* for and during the Term
 “ of her natural Life; of the Lord, &c, by the Rod and by
 “ Copy, &c, according to the Custom, &c, by the yearly Rent,
 “ &c. And so the said *Blackwell* and *Rachel* are now admitted
 “ Tenants, &c; and have severally Seisin by the Rod. And
 “ the said *Blackwell* doth his Fealty: But the Fealty of the said
 “ *Rachel* is respited. And the said *Blackwell* giveth for his
 “ aforesaid Admission *Nothing*; BECAUSE He was *before* ad-
 “ mitted to the same Premises; but giveth and payeth to the
 “ said Lord, in Court, for the aforesaid Admission of the said
 “ *Rachel*, &c.”

During all this Time, the said *Blackwell North* served upon the
 HOMAGE, as a Customary Tenant.

In *October* 1753, *Blackwell North* died, without Issue.

On 21st *January* 1754, the said *Rachel North* (his Widow)
 was admitted in Fee to the Premises, under the said Will of
Blackwell North, her Husband; and surrendered the same to the
 Use of her Will.

On 21st *May* 1764, She made her Will; and devised to the
 Lessor of the Plaintiff; and died in *June* 1764.

On 20th *May* 1765, the Lessor of the Plaintiff was admitted
 to the Premises, under *Rachel's* Will.

The

The Defendants *Elizabeth Griffiths* and *Mary Thomas* are the Heirs at Law of the said *Blackwell North*.

The Question is "Whether the Plaintiff is intitled to recover under this Ejectment?"

Mr. Cox, on Behalf of the Plaintiff, the Devisee of *Rachel*, argued that Nothing had been done to *revoke* the Will of *Blackwell North*.

He said He would premise some Rules which have been lately laid down in Cases of the like Kind: But that He was fighting in the Dark; not knowing what his Adversary would insist upon.

LORD MANSFIELD—The *Other Side* had better propose their Objections, and go on.

Mr. Serjeant *Leigh*, who was for the Heirs at Law of *Blackwell North*, accordingly did so: And his Argument was, in Substance, as follows—

What *Blackwell North* has done since the Making of his Will amounts to a REVOCATION of it.

The Short of the Case is this—*Blackwell North*, being seised in Fee, surrendered to the Uses of his Marriage-Settlement. In this Settlement, He reserved a Power to dispose amongst his Children; with Reversion to Himself, in Fee.

This Surrender, though made in 1724, was not *presented* till 1751.

The mere Surrender had no Effect, *before* the Presentment of it: *Blackwell North* had the whole Fee *still* in Him.

The Surrender unpresented made *no Alteration* in the Estate of the Surrenderer. None could happen TILL *Admittance*: For Nothing passes till *Admittance*. *Cro. Jac.* 403. *Trosel versus Welsh.* 3 *Bulstr.* 214. S. C. (though called there *Roswell versus Welsh.*) 1 *Peere Williams* 14. *Fisher versus Wigg.*

This being the Case, His being sworn upon the Homage and appearing as Tenant, makes no Difference; because He was Tenant in Fee to the Lord, *before*: He only *continued* Tenant. It is not like the Case of a *Stranger*, summoned by the Lord "to attend his Court:" Which may amount to a virtual *Admission* of Him.

The Surrender, to the Use of his Marriage-Settlement, was in 1724: That, to the Use of his Will, in 1725.

This Surrender to the Use of his Will operated, therefore, upon his first Estate, the *old Estate in Fee*; not on the *new Reversion*.

In 1743, He made his Will, and devised to his Wife in Fee: Under whom the Plaintiff claims.

But the original Surrender of 1724 was not presented till eight Years after his Will was made: And He was thereupon admitted *according to the Tenor* of the Surrender in 1724; though to *different Uses*, a little varying from those of the original Surrender.

However, this Description in the Admittance is of no Consequence: For the Surrenderee is in under the *Surrender*, and *not* under the Admittance; the Lord being merely an Instrument. *1 Ro. Rep. 438. Lane versus Pannell*; and many other Cases.

And here, the Lord *has admitted Him according to the Tenor and Intent of the Surrender*.

The Difference between the Surrender and the Admittance arose, probably, from *Blackwell North* and his Wife having, at the very distant time of the Admittance, no Children, nor Expectation of any after so many Years.

On this Admittance, therefore, He became Tenant for Life &c, according to the Limitations in the Surrender.

A Surrender *varying* the old Uses and *creating new* Ones would undoubtedly revoke the Will.

But the great Point which will be urged against Me, (since the Determination of the Case of *Selwyn versus Selwyn**,) is, "That the Surrender was a Part of the *same Transaction*; and "that the Admittance will *refer back* to the Time of the Surrender, and All be considered as *One Conveyance*." And this is the great Difficulty I have to get over.

* V. ante
vol. 2.
page 1131.

I shall therefore endeavour to *distinguish* this Case from that of *Selwyn versus Selwyn*.

That Case turned upon a *Recovery*: This, upon a *Surrender* and Admittance.

The

The Surrender in 1724 to the Uses of the Marriage-Settlement *passed Nothing out of the Surrenderor*: Which is *not* the Case of making a Tenant to the *Præcipe*, in a Common Recovery. Again, The *Admittance* gives the Operation here: But in the Case of a Common Recovery, it is the *Deed* to make a Tenant to the *Præcipe* which does it, and is the operative Instrument.

Another great Ground of the Case of *Selwyn* versus *Selwyn* was, "to complete the *Intention* of the Tenant in Tail:" And the Whole was therefore taken *together*, as *One* Conveyance.

But here, *Blackwell North* had the *whole Fee* in Him: He had a devisable Estate in Him, *before* Admittance. And so He thought, Himself: For He *waited eight Years* to be admitted, *after* He had made his Will. Therefore He had no Intention to *effectuate* his Will, *by* this: He only intended to have his Wife admitted Tenant for Life.

Therefore there is no Need nor Reason in the present Case, to *couple* these Acts together, in order to *effectuate* his Intention.

This Surrender and Admittance do therefore FOLLOW the Will, and *not precede* it. Consequently, They are a *Revocation* of it: And therefore the Lessor of the Plaintiff, who claims under it, has no Title.

Mr. Cox, *contra*, for the Lessor of the Plaintiff.

A Testator must have the *same* Estate at the Time of his *Death*, as at the Time of the *Devise*: Or else, 'tis a Revocation. * *Selwyn* versus *Selwyn*; and *Doe*, on the Demise of *Odiarne*, versus *Whitehead* *. * V. ante, vol 2. pages 1131 and 704, respectively.

But it is otherwise, where there is *not* an *Alienation*: For, in such Cases, 'tis a *Corroboration*; as Performance of a Condition, by One who has an Estate on a Condition; or getting in an equitable Estate; or levying a Fine, to confirm Partition. For, where there is *no* Alienation, it will be no Revocation; unless an *Intention to revoke* some how appears.

Articles to settle Land will not amount to a Revocation: I mean, that they do not, at *Common Law*, amount to One. 2 *Peere Williams* 328. *Sir Barnham Rider* versus *Sir Charles Wager*.

In *Copyhold Estates*, there is *no* NECESSITY of an Admittance, but only in Case of the *Change* of a Tenant: And here was *no* Change of Tenant. On the first Surrender to the Use of his Marriage-Settlement, there was no Occasion of an Admittance: The Surrenderor and Surrenderee were the *same Person*. The Lord knew his Tenant; and He could not have compelled a new Admission of Him, even if the Wife had died: And there could be no Admission of the Children unborn. The Lord is only an *Instrument*. A Person could not be admitted, who was *Tenant before*: At least, it was not requisite for *Him*; though it might have been so for his *Wife* and *Children*. His Continuing to appear as a Homager, will apply to every Surrender that He shall make afterwards. When he was admitted, He *paid Nothing*; as having been *admitted before*: But if He had not been admitted, the Surrender was void; and then the Will would operate upon the *old Estate*. It might operate as well upon the *old Estate*, as upon the *new Use*.

His Admission in 1751 was *no Alienation*; and there was *no Occasion* for it: He was only admitted to a *less Estate* than He had before. The Surrender is the *material Instrument*: The Admission *could not exist* without it. If there was *no Occasion* for the Admission, it can not amount to a Revocation. He was thereby only *establishing* the Estate upon which He meant the Will should operate. And if it is not void, it must REFER BACK to the Time of the Surrender. *Selwyn versus Selwyn*: (*Ante* 1131.)

The subsequent Inrolment of a Bargain and Sale will make good the preceding Act. *Godbolt* 270. *Ludlow* and *Stacie's Case*.

All these together operate as ONE Assurance. *Selwyn versus Selwyn*. *Doe, ex Dimiss*. *Odiarne versus Whitehead*. *Sir John Ferrer* and *Sir John Curson versus Sir Richard Farmer et al*. *Cro. Jac.* 643.

A *very material Part*, (*the material Part*, indeed,) of this Assurance (*viz.* the Surrender) was made *before* the Date of the Will. The SURRENDER was his *own Act*: The ADMISSION is not *his Act*, but the *Act of the Lord*. And the Act of *another Person* shall not operate as a Revocation. Besides, The Admittance *relates* to the Surrender. *Sir William Jones* 428. 1 *Salk.* 185, *Benson versus Scot*. 4 *Co.* Copyhold Cases 28, 29*.

* V. ante, 1543.

The *Admission* is *not* the Material Part: It is only a Confirmation of his Intention. However, there could not be an Admission

mission of *more* than is justified by the Surrender: And it is consistent with the Will.

The Husband neither was nor *could* be admitted to the *Reversion*. The Admission could be good only for the two Lives; because the Interest of *unborn Children* intervened; who could not be admitted, because *not in esse*: And the Wife's Estate was *less* than the Surrender gave Her. Therefore this Admission *could not* be a *Revocation*. It does not destroy the Estate given by the Will.

A Conveyance, after making the Will, could only be a *Revocation pro tanto*. *Lamb versus Parker*, Equity Cases abr. 410. pl. 9.

It is most clear, that *Blackwell North* never meant or intended that this Admission should operate as a *Revocation* of his Will. It can operate no further than it went: And it went no further than the *Lives* of Him and his Wife.

The Surrender was either void; or so far good, as that the Will operated upon the *old Estate*. If it operated upon the *Reversion*, it was *no* *Revocation*.

Mr. Serjeant *Leigh*, in Reply—An *Admittance* SUBSEQUENT to a Will, amounts to a *Revocation* of it.

The Case of *Lamb versus Parker* was only a *partial* Disposition: This is a *total* One; a Disposition of the *whole* Fee; an Alteration of the old Uses; and a manifest *new Disposition of the WHOLE*.

The Admission here *follows* the Surrender. The whole Uses were varied. This is a total Disposition of the *old Use*; and a Creation of *new* Ones. And they have arisen *upon* such Admission: They did *not* arise before. A Purchaser under *new* Uses can not be in *before Admission*.

The Will can not operate *both* upon the old Use *and* upon the new One.

The great Difficulty with me is that of it's *All* being ONE Conveyance, and the Admission's REFERRING BACK to the Surrender.

In the Case of *Doe, ex Dimiss*". *Odiarne versus Whitehead*, the Parts could not be separated: But here, the Transactions are UN-connected.

connected. This Testator had a good devisable Fee-simple, at the Time of making the Will.

As to his Intention to *confirm* his Will—If He meant to *confirm* his Will, Why did He wait eight Years before Admittance? If He thought He should have no Children, What Need had He to pay a Fine, for Admittance to what both He and His Wife had *before*? There was no Reason for his being admitted in order to *confirm* his Will: And therefore He meant by this Admission in 1751, to *revoke* it.

Lord *Mansfield*—The Question is, “Whether this Will *stands*, as a good subsisting Will; or is *revoked*?”

It has been argued at the Bar, upon the Foot of a REVOCATION; and “that the Lord took from the Surrenderor, and re-
“ granted to Him again the *whole* Estate;” and “that this
“ amounts to a Revocation of his Will.”

There is no Colour, upon the Circumstances stated in the present Case, to say that the Testator INTENDED to revoke his Will. An INTENTION *to revoke* might indeed (if it had sufficiently appeared,) have made a very different Case. Here it is clear that the Testator had *no* such Intention.

The CHANGE OF ESTATE is, therefore, the only Objection that can be urged in *this* Case.

Where a Man, seised of an Estate, makes his Will and devises it, and afterwards conveys it *entirely* away; though He takes it back by the same Instrument, or by a Declaration of Uses; it is a Revocation; because, as it is said in the Books, He has *parted with his whole* Estate.

This Rule being now established, must be adhered to: Although it is not founded upon truly rational Grounds and Principles, nor upon the Intent, but upon legal Niceties and Subtlety. However, as in the Earl of *Lincoln's* Case*, it was so far established that it ought to be observed in future, if a like Case should happen; we must not depart from it now, notwithstanding One would wish that no such Rule had ever been established, and lament that such nice Subtilties should have been admitted as the Ground of it.

* V. Shower's
Pail. Cases
154. and
Abridgment
of Equity
Cases, v. 1.
p. 411, 412.
Earl of Lin-
coln v. Rolls
et al'.

But the present Case does *not* come within the Rule. *Blackwell North*, the Testator, had a REVERSION IN FEE in Him. And though He limits it to Himself†, the Words *do not operate*:
For,

† V. ante,
p. 1954.

For, the Use results by Operation of *Law*. This *Reversion in Fee* is the only Subject-Matter of the *Devise*. In 1725, He surrenders to the Uses of his Will; and afterwards, in 1751, He is admitted, upon the former Surrender (made in 1724,) to the Uses of his Marriage-Settlement.

An Admission must *follow the Surrender*: The Lord has no Power over it. The Surrender directs and governs the Admission. Therefore the Admission is *prout Lex postulat*: It is no Re-Admission to his REVERSION. It effectuates the *Uses* limited; but leaves the *Reversion* as it was.

This makes an End of the Case: For, here is no Conveyance of the Fee; *no taking back* an Estate in it.

But supposing the Fee to have been limited to a *third* Person—
I do not think that even in that Case, what has been done by the Testator would have revoked the Will.

It is said, on the Part of the Defendants, “that the Surrender “*alone* (un-presented,) makes *no* Alteration whatsoever.” But I deny that: It is a *Conveyance* of the Ownership of the Estate; and the *Admittance* is only **Form*. 'Tis a Ceremony derived from the *Origin* of Copyholds: But the Lord's Act is, *now*, mere Form. He can not alter, nor affect the Surrender: He is a mere *Instrument*, and *compellable* to admit according to the Surrender. A *Mandamus* would compel Him: A *Decree* in Chancery would compel him. The Surrender is a Deposit in his Hands: The Land is bound by the Surrender; and the Admittance has *Relation* to it.

The Case of *Benson* versus *Scot* is decisive †, “that the Land “is bound by the Surrender; and that the Admittance *relates* “to the Surrender.” This is settled.

If a Joint-tenant in Fee surrenders to the Use of his Will; devises, and dies; and then the Surrender is presented; the Admittance of the Devisee to a Moiety shall ‡ relate to the Surrender. The Estate of the Land was bound by the Surrender. The Admittance is *Form*: It is the Shadow to the Substance.

If a Disfeisee makes his Will, and afterwards enters, and then dies; 'tis a good subsisting Will, and not revoked: For, his Entry shall have Relation back to the Time of the Disfeisin. So, if a Disfeisee releases, it shall have Relation back. So, an Escheat after the Date of a Will. So, if a Person seised of a Remainder in Fee makes his Will; and then the Tenant for Life dies, in

* V. ante, 1543. accord.

† 1 Salk. 185.

pl. 3.

‡ V. Co. Lit. 51. b.

the Testator's Life-time; the Will is not revoked thereby. All these shall relate back.

So here, the Admittance of the Lord shall *relate back* to the Time of the Surrender, and is only a *Completion* of it.

This Case is directly within the Principles of the Case of *Selwyn* versus *Selwyn*; "That the *Whole* of a Conveyance shall be *taken together*; and the several Parts of it shall *relate back* to the *principal Part*."

So that *either* no Alteration at all is made by this Admittance; *or*, if there be any, yet the Admittance shall have Relation back to the Time of making the Surrender.

Therefore I am most clearly of Opinion "That there is no Doubt at all in this Case."

The Other THREE JUDGES concurred in the same Opinion: And ALL agreed, "that after the Surrender in 1724 to the Uses of the Marriage-Settlement, the REVERSION still remained in *Blackwell North*; and that no *Alteration or Change of Estate* happened in this Case*."

* See many of the Cases here cited, together with more on the same Subject, in Viner, Title Devise (R. 6.) "Revocation by Act of Law, or Alteration of Estate in Devisor." Page 143 to 151.

Per Cur'. unanimously—

Judgment for the Plaintiff.

Monday 17th
Nov. 1766.

Winchelsea Causes.

SEVERAL Rules were depending at this Time, against a large Number of the Corporators of this Burrough, for them to shew Cause (respectively) Why Informations in Nature of *Quo Warranto* should not be granted against them, to shew by what Right they claimed to hold their Offices.

The *Length of Time* that they had been in *Possession* respectively, was very different: Some of them had been in Possession above 20 Years; some of them, near 20 Years; and some of them, considerably less than 20 Years.

THE COURT thought it would be right to fix a certain Point of *Limitation*, beyond which they would not go back, to disturb a Possession so long acquiesced in. And having taken due
Time

Time to consider how many Years this quiet Possession ought to have lasted, in order to protect it from future Impeachment; They now publickly declared the Resolution they were unanimously come to; namely, that after *twenty* Years unimpeached Possession of a Corporate Franchise, no Rule ought to be granted against the Person in Possession, to oblige Him "to shew by what Right he holds it."

This Resolution, they said, was *analogous* to the Rule that had been laid down in several other Cases.

The Statute of Limitations (21 Jac. 1. c. 16. sect. 1.) concerning Writs of Formedon and Entry into Lands, is confined to twenty Years. The Statute of 10 W. 3. c. 14. § 1. concerning Writs of Error is also confined to twenty Years. Courts of Equity do not allow the Redemption of a Mortgage, after twenty Years. Bills of Review have been generally disallowed after twenty Years. Bonds which have lain dormant, shall be supposed to be satisfied, after twenty Years. Ejectments require a Proof of Possession within twenty Years.

So that there is an *Analogy* between this and other Limitations confining the Retrospect to a reasonable Time. And LORD MANSFIELD notified to the Bar, in the Name of the Whole Court, That upon talking over and considering the Subject, They were All clearly of Opinion "that twenty Years was the *ne plus ultra*, " *beyond* which the Court would *not disturb* a peaceable Possession " of a Franchise: But that in every Case *WITHIN* twenty Years, " their granting the Rule, or refusing to grant it, would depend " upon the particular *Circumstances* of the Case that should be in " Question before them."

Rex *versus* Edwin Wardroper.

Wednesday
19th June
1766.

TWO Days after such Declaration made by the Court, as above; there came before them several of these Rules "to shew Cause why Informations in Nature of *Quo Warranto* should not be granted against the several Defendants claiming Rights as Corporators of *Winchelsea*."

One of the Principal of them was this *Edwin Wardroper*. The Length of Possession of their respective Corporate Offices were (as has been said before) very different: some, above twenty Years; some, under. *Wardroper's* Possession was of the Length of nineteen Years and eight Months, after a *Re-Election*, (which *Re-Election* had been made for greater Caution;) and of twenty-seven Years from his *original Election*. The Objection to Him

was

was *Non-Residency*, sworn against him to the *Belief* of three Persons who made the Affidavits. But He produced *positive* and full Affidavits to the Contrary: And He shewed that the Makers of the Affidavits had voted for Him; and had *concurred* with his Acting in this his corporate Office, upon many Occasions; and never before objected to the Legality of his Right. He also swore that He had paid Scot and Lot. Whereupon,

Sir *Fletcher Norton*, on Behalf of the Defendant, prayed that the Rule might be discharged *with Costs*.

Mr. *Harvey*, Mr. *Kemp*, Mr. *Walker*, and Mr. *Dunning* insisted that the Question turned upon this—"What was a *real*; " what, a *colourable* Residence:" And this, they said, *ought* to be tried by a *Jury*, not upon *Affidavit*; especially, in a Case like this, where there is no Danger of the Dissolution of the Corporation.

• V. ante,
vol. 3.
page 1615.

Lord MANSFIELD mentioned the Case of Sir *William Trelawney**, who was Steward of the Burrough, at the Time of his Election to be a Capital Burgefs of *West Loe*. And the Court discharged the Rule obtained against Him; without sending the Question to a Jury.

The Statute of 9 *Ann. c. 20.* had a View to the speedy Justice to be done against Usurpers of Offices in Corporations, as well as to quiet the Possession of those who had Right. And that Act does not leave it to the Discretion of the Officer, as it was before; but puts it in the Discretion of the Court. Therefore the Court must exercise a Discretion. It would be very grievous that the Information should go of Course: And it would be a Breach of Trust in the Court, to grant it as of Course. On the Contrary, the Court are to *exercise a sound Discretion* upon the particular Circumstances of every Case. Now here is no Fact sworn, to impeach the Defendant's Right. Therefore the Court, if it had been nicely attended to, ought not indeed to have granted the Rule. As to the Residence of the Defendant, Nothing more than Apprehension and Belief "that He was *not* " resident, are sworn to: No Fact. But the Defendant swears positively to the Fact, "that He *was* resident at the Time;" and swears to a Re-Election, made upon a Doubt of his former Election: Which is a Fact of Notoriety in the Place, and a Circumstance leading to believe that He was resident at this Re-Election. And these very Persons who now make the Affidavit against Him, voted at his Election: And they have voted with Him at other Elections. His Re-Election is above nineteen Years ago: And many Others claim under his Rights.

Therefore, on the Merits of this Rule alone, independently, I think it ought to be discharged with Costs, for the Misbehaviour of the Parties applying for it. But if it shall appear that there is Misbehaviour on both sides, it may be a different Consideration, as to the Costs.

The THREE Other JUDGES concurred to discharge the Rule with Costs. They said, They ought not to encourage vexatious Prosecutions, which tend to throw Corporations into Confusion. Here is a long Acquiescence; though not indeed *quite* twenty Years: And the Defendant is now attacked without sufficient Grounds. The very Persons who now object to Him have themselves voted for Him, and concurred with Him in his Acts as a Corporate Officer. Their Conduct therefore gives the Lye to their Complaint.

Here is a sufficient Residence proved: And he bore the Burdens of the Corporations, and paid Scot and Lot, which must have been Notorious.

This is a hardened, as well as a groundless Application: And if the Court were to make this Rule absolute, They would act contrary to the Words and Spirit of 9 *Ann. c. 20.* which intended to quiet the Possessions of such as had a Right, as well as for the speedy Removal of Usurpers.

Indeed, No Length of Usurpation shall affect the *Crown: Nullum tempus occurrit Regi.* The King will not be bound by our discharging the Rule: The Crown may still bring a *Quo Warranto.* But we are to exercise a just Discretion, and not to promote Vexation.

THE COURT were most clear and unanimous, in their Opinion "that the Rule ought to be discharged:" And as the Application was so very unreasonable and groundless, they thought that the Case of *New Radnor* [*ante, Vol. 1. pa. 580. Rex versus Lewis,*] would warrant their discharging it with Costs. Therefore

Per Cur'. unanimously—

Rule discharged *with Costs.*

Friday 21st
Nov. 1766.

Da Costa versus Firth.

THIS was an Action on the Case, for 200 *l.* upon an *Indebitatus Assumpsit*, for so much Money had and received to the Use of the Plaintiff. *Non Assumpsit* was pleaded; and Issue joined. It was brought by an Insurer against an Insuree, to recover back what he had paid him. The Cause was tried before Lord MANSFIELD at *Guildhall*, at the Sittings after last *Trinity Term*: When it was agreed that a Verdict should be given for the Plaintiff, (with Damages 104 *l.* Costs 40s.) subject to the Opinion of this Court, upon the following Facts.

A Policy was underwritten by the Plaintiff; being an Insurance upon any of the Packet-Boats that should sail from *Lisbon* to *Falmouth*, or such other Port in *England* as His Majesty should direct his Packets appointed between *Lisbon* and *England*, for One whole Year, commencing 1st *October* 1763, and to continue to the 1st of *October* 1764 inclusive, upon any Kind of Goods and Merchandizes whatsoever: And it was agreed that the Goods and Merchandizes should be valued at the Sum insured on such Packet-Boat, without further Proof of Interest than the Policy; and to make no Return of Premium for Want of Interest being on Bullion or Goods. And in Case of Loss or Misfortune, the Insured were to be at Liberty to sue labour and travel for in and about the Defence Safeguard and Recovery of the said Goods and Merchandizes or any Part thereof, without Prejudice to the Insurance; to the Charges whereof the Insurers were to contribute, each One according to the Rate and Quantity of his Sum insured. The Consideration paid by the Insured was 10 *l.* per Cent: And in Case of Loss, they were to abate Nothing.

N. B. Corn, Fish, Salt, Flour and Seed were warranted free from Average, unless general, or the Ship be stranded. Sugar, Tobacco, Hemp, Flax, Hides and Skins were warranted free from Average under 2 *l.* per Cent. And All other Goods free from Average under 3 *l.* per Cent; unless general, or the Ship should be stranded.

The Defendant, Mr *Michael Firth*, who was One of the Insured, had an Interest in Bullion on Board the *Hanover* Packet, being One of the King's Packets between *Lisbon* and *Falmouth*.

On the 2d of *December* 1763, It was totally lost off *Falmouth*, in a Voyage between *Lisbon* and *Falmouth*: And the Loss was adjusted, in Writing under the Policy, in the Words following—

“ Adjusted a Loss on this Policy at 100*l.* *per Cent*; the
“ *Hanover Packet*, Captain *Sherborn*, being totally lost at *Fal-*
“ *mouth*.—Should any *Salvage* hereafter be recovered, the Insured
“ promises to refund to the Insurers whatever He may so recover,
“ in such Proportion as the Sum insured bears with the whole
“ Interest. *London*, 23d *October* 1764. for *Richard Seward*—
“ *Michael Firth*.”

And the Fact seems clearly to have been (though the Case does not state it,) that the Insurer paid the whole Money insured. Indeed, this very Action shews that he must have paid it: Because the End and Intention of the present Suit is to oblige the Defendant to refund it, as having received it without a just Right to do so.

In *April* 1765, the Iron-Trunk which contained all the Bullion, was fished up; and thereby All the Bullion recovered, without any Loss or Prejudice whatever; and delivered to the Defendant.

The Defendant's Expence of Salvage amounted to 63*l.* 8*s.* 2*d.* And, deducting that Sum for Salvage, the nett Proportion of his Share came to 206*l.* 11*s.* 9*d.*

The Plaintiff's Proportion thereof, in Respect of his Subscription, amounted to 48*l.* 4*s.*; which was paid into Court.

The Question was “ Whether the Plaintiff, upon this Case, “ was not intitled to recover in this Action.”

Mr. *Mellish*, on Behalf of the Plaintiff (the Insurer,) argued, 1st. That the Contract was performed; and that the Loss can not be considered as a *total*, but as an *Average-Loss*: 2dly. That the *special Agreement* “ to allow the Insurer in the Proportion of “ the Sum insured to the whole Interest,” made no Difference.

In Support of the first Position, He cited the Case of *Hamilton* versus *Mendes*: Which may be seen at large, in Vol. 2. p. 1198. and fully abstracted, in the Index to that Volume, under Title “ Policy of Insurance.”

The Insurance is on the safe Delivery of the Bullion, according to the real and true Spirit of it. It is not an Insurance upon the *Ship*: Neither is it a Wagering-Policy, nor a Cover of a Wager.

The

The Money was paid on a *Supposition* of a total Loss: But this was *not* a total Loss. To prove which, he cited *Bynkershoek's Quaestiones publici Juris*, c. 7. and *Fitzgerald versus Pole*, in the House of Lords in 1754.

So here, it could not be considered as a total Loss: For, the *Spes recuperandi* was not gone. Here was an *actual Salvage*. It can not be an Average-Loss: For, *All* was saved. Therefore the Contract was performed. And consequently We ought to receive the Money back.

Secondly—This Contract was not altered by the Adjustment and Agreement “to refund to the Insurers whatever might be recovered, in the Proportion of the Sum insured to the whole Interest.” But this Salvage must be estimated *according to the Value inserted in the Policy: Lewis and Another versus Rucker**. In that Case, the like Proportion at which the Sugars were valued in the Policy, was paid, as the Price of the damaged Sugars bore to sound Sugars, at the Port of Delivery.

* V. ante,
vol. 2,
page 167,
1172, 1173.

Therefore as the *Whole* is recovered, the Whole of the Value must be refunded: For, this is merely the Case of a Salvage.

Mr. Wallace *contra*, for the Defendant, argued that He could not be compelled to refund.

The Money was paid *bonâ fide*, and under a full Apprehension of the Facts: And it did not exceed the Loss at the Value fixed by the Policy. It was a *total Loss*. If the Goods are recovered, they are the Insurer's; and He may make what He can of them. The Recovery of them may happen at a vast Distance of Time.

Roccus, Notabilia, page 204 is in Point, “That it is in the *“ Election of the Insured.”* Otherwise, the Insurer might *profit*: Which He ought not to do.

Secondly, Upon the Special Agreement—It was adjusted, “That if any Salvage should be afterwards recovered, the Insured should refund to the Insurers whatever he might so recover, in such Proportion as the Sum insured bore to the whole Interest.”

And we have paid the Money in that Proportion, into Court.

The Change of Property does not take Place between the Insurer and the Insured.

In the Case of *Fitzgerald versus Pole*, the Insurer was not liable under *that* Policy. The being a *valued* Policy refers only to a *total* Loss: It does not affect the Case of an *Average*-Loss.

This is a mere *Wagering*-Policy: And therefore the Loss having happened, the Whole is to be paid by the Insurer.

Mr. Mellish, in Reply—This is *not* a *Wagering*-Policy. It is a *valued* Policy: And the Loss is only an *Average*-Loss.

As to a *limited Time* for the Recovery—It is not till after the *Spes recuperandi* is gone. Here, it clearly was *not* gone.

As to *Roccus*, 204—The Insured *has* made his *Election*: For He took the Bullion from the Bank.

As to the Point of it's being a *Wagering*-Policy—'Tis within the *Words* of 19 G. 2. c. 37. Therefore they ought to shew that They are within the Exception. But it is not within either the *Words* or *Meaning* of the Exception: The *Words* of the Statute are "Goods and Merchandizes." And there never was a *Wagering*-Policy without the *Words* "Free of Average," and "without Benefit of Salvage."

The Statute prohibits assuring, Interest or no Interest. But here was an Interest: The Bullion was undoubtedly an Interest. And a real Advantage might accrue to the Public, by bringing in Bullion: Whereas a mere Wager is no Benefit to the Public. Therefore the Exception must be restrained to such Cases as the Public can receive *no Benefit* from, but may rather receive a Prejudice.

THE COURT agreed that this was a Policy of a *peculiar* Sort; and within the Exception of the Statute of 19 G. 2. c. 37.

It is a *mixed* Policy; partly, a *Wager*-Policy; partly, an open One: And it is a *valued* Policy, and fairly so, without Fraud or Misrepresentation. Therefore the Loss having happened, the Insured is intitled as for a *total* Loss.

The Insurer agreed to the Value; and is concluded to dispute it. The Insured has received the Money as for a *Total* Loss: And there is no want of Conscience in retaining it.

* Ante, 1167.

† Ante, 1198.

‡ Ante, 683.

The Cases of * *Lewis and Another* versus *Rucker*, † *Hamilton* versus *Mendes*, and ‡ *Goff and Another* versus *Withers*—were only “that where the Average-Loss appears *before* Adjustment, “the Under-Writer shall pay only the *real* Damage.” And the Reason is—That the Insured must shew the whole Case, as it then stood. In the present Case, there was a total Loss at the *Time* of the Adjustment.

The Adjustment in this Case makes an End of the Question. Here is a solemn Abandonment, and a solemn Agreement “that “the Insurers shall be content with Salvage in such Proportion “as the Sum insured bears to the whole Interest.” There was a total Loss at the Time of the Adjustment; (which is the same as if the Damages had been then recovered on an Action.) Here is no Sort of Fraud; nor any Thing that is against any Law: And to refund *more* than in that Proportion would be contrary to the Under-Writer’s own Agreement.

Therefore the Net Proportion only, in Respect of the Plaintiff’s Subscription, after Deduction of Salvage, ought to be returned to Him: And that is paid into Court.

Per Cur’. unanimously—

The Postea to be delivered to the Defendant.

N. B. This Sort of Policy was agreed not to be novel in *Practice*; though New in *Westminster-Hall*; no such having come in Question there.

Saturday 22d
Nov. 1766.

Doe, on the Demise of Mary Beyer, *versus* Roe.

IN Ejectment. Upon shewing Cause against a Motion to set aside a Writ of Possession for Irregularity, for that the *Lessor of the Plaintiff* died before the Writ of Possession was actually *judged out*—

The Facts were, That the Lessor of the Plaintiff died on the 1st of *March*: After which Event, the Writ of Possession was taken out. But it was *tested* on the last Day of the preceding *Hilary* Term; returnable on the first Day of the following *Easter* Term.

Master *Owen* certified “that this Proceeding was *regular* :” And He said, that it would have been so in any other Case, as well

well as in an Ejectment; by Reason of the Writ's *Relation* to it's *Teste*.

THE COURT were clear, "that the Proceeding was regular." And they thought the Circumstances of this Case did not intitle the Defendant to any extraordinary Favour. This is an Ejectment brought by *John Doe*: and the Defendant does not shew that *John Doe*, the *Plaintiff in this Action*, is dead. However, The *legal Relation* to the Day of the *Teste* is proper to be supported, in Maintenance of a Writ of Possession on a Judgment in *Ejectment*.

The Rule was discharged with Costs.

Farmer *versus* Sir Robert Darling.

Monday 24th
Nov. 1766.

ON *Thursday* last, Sir *Fletcher Norton*, on Behalf of the Defendant, moved for a New Trial, and to set aside the Verdict, which had been given for the Plaintiff in an Action for a malicious Prosecution, with 250*l.* Damages, at the *Middlesex* Sittings at *Nisi Prius* before Lord *Mansfield*, on the 15th Instant.

His Objections were—1st. That the Damages were *excessive*: 2dly. That the Verdict was *against Evidence*.

He had a—

Rule to shew Cause.

LORD MANSFIELD now reported the Evidence—

It was an Action for a *malicious Prosecution* of the Plaintiff, by two Indictments for Nuisances; One, by a Drain; the Other, by his Poulterer's Yard; both of them near the Prosecutor's House: Upon which Indictments the then Defendant and now Plaintiff had been acquitted.

It appeared, upon the Report, "that there was Malice implied:" And it appeared, that the Plaintiff had actually and *bonâ fide* paid 140*l.* in defending Himself against the two Indictments.

HIS LORDSHIP said, He told the Jury, that the Foundation of this Action was MALICE; which must be either *express*, or *implied*: And He acquainted them, that They were *not* obliged to give *All* the 140*l.* expended; or, They *might* (on the other Hand) give *more*, if they should see it proper to do so. He said,

said, He left it to the Jury, to consider of the implied Malice, from the groundlessness of the Prosecution.

Sir *Fletcher Norton*, Mr. *Morton* and Mr. Recorder *Eyre* now argued on Behalf of the Defendant, for a New Trial.

They said, there was *another* Requisite to the Maintenance of this Sort of Action, BESIDES *Malice*: It was *also* necessary to prove "That the Indictment was *causeless* and *without any Foundation*." Both these are *essential*, and necessary to be proved.

As in a Writ of Conspiracy, *Falsity* is necessary to be charged; So, in this Case, *Malice* ALONE is not sufficient: It must also be a Prosecution *without any Foundation*. These are two *independent* Essentials to the Maintenance of this Action: There must be both *Malice* and *FALSITY*.

We admit there was *some* Evidence of *Malice*: But it was proved, by sufficient Evidence, *to be a NUSANCE*. Therefore there was a *probable Cause* for the Indictments: And if there was, then the Prosecutor is not liable to this Action for a malicious Prosecution; whatever Motive might induce the Prosecutor to indict the Person guilty of the Offence. It would be of dangerous Consequence, to make a Prosecutor liable to this Action, where there is a *probable Cause* for indicting an Offender.

Secondly—The Damages are *excessive*. And the Court may grant a new Trial in Matters of *Tort*.

The Bill of 140*l.* was greatly *over-charged* in many Articles. It ought to have been proved to have been *properly* paid, as well as *bonâ fide*. But this Bill is not so. For *some* Articles in it, there were no Vouchers; and some of them are too general; as, (for Instance,) "Sundry Expences, fourteen Guineas."

The Counsel for the Defendant alledged, that seventeen Witnesses proved—"that the Nuisance *existed*:" One of whom was the Foreman of the Grand Jury. And they also alledged, that it was fully proved, "that Sir *Robert Darling* did think, and had "good Reason to think, that it *was a Nuisance*."

Besides, *Farmer* Himself was the Occasion of its running to so great Expence: For, the Indictments were found at *Hicks's Hall*; and He removed them hither, by *Certiorari*. It was He also that moved for a *View*: To which Sir *Robert D.* consented, when He needed not to have done so. The Defendant in the Prosecution could not suffer any more Damages than the Money
out

out of Pocket. There could be no Injury *but* to his *Property*: There was None, to his *Fame*. He could be intitled to no Compensation for any Thing *else* but pecuniary Damage: And the Jury could take nothing further into their Consideration, as the Measure of the Damages they were to give. 1 *Salk.* 13. *Savil* versus *Roberts*.

Mr. *Stowe* and Mr. *Wallace contra*, for the Plaintiff, denied the Damages to be excessive at all; much less against a Man of great Fortune: Which a Sheriff of *London*, they said, must be supposed to be, at least as far as 15000*l*; for otherwise, He might have been excused from serving the Office by swearing Himself off. This Prosecution of the Indictments was at the Peril of the Defendant's Trade: Which would have been destroyed, if the Prosecution had succeeded.

Upon the *whole* Evidence, We proved, and the Jury believed, that the Indictments were *groundless*, as well as malicious.

In such an Action as this is, the Court can not measure the Damages by any certain Rule: They have none to go by. The Articles in the Bill of Costs were all of them necessary Expences to the Plaintiff, in Order to defend Himself against these Indictments; and were ready to have been proved, if objected to at the Trial: And the Whole was proved to have been *bonâ fide paid*. And He had Reason to remove them from a Court where the Prosecutor would have been upon the Bench.

The Distress and Vexation, and all the Inconveniences the Plaintiff was put to, may fairly be taken into the Consideration of his Damages, as well as the pecuniary Expences.

LORD MANSFIELD—

This Action is for a malicious Prosecution, without a probable Cause.

I can not say that the Jury have done wrong here, in finding that the Indictments were preferred without probable Cause.

This Drain was an ancient Drain. The Fault arose above and below *Farmer's* Part of it. His Brick-Drain was cleaned, and clear. The Gift of the Indictment was "that He did not lower his Drain." He had no Need to do it.

The Verdict was not, in my Opinion, against Evidence.

The next Prosecution was for the Feeding the Fowls. And I can not say that the Jury had no Reason to find this likewise to be an Indictment without probable Cause.

Every Stench is not a Nuisance: Nor is every noisom Trade a Nuisance, in every Place; though Many of them are Nuisances by Reason of their Locality. This was an ancient Trade, long carried on in this Place; long before Sir Robert Darling came there. He comes and builds a House near it, in a Place that was formerly a Poultry-Yard. No-Body before complained of it, or presented it. So that the Conclusion does not follow, "that it was a Nuisance." And the Jury had a View. Therefore I can not say, that the Jury had no Reason to take the Prosecution to be groundless.

As to the Excessiveness of the Damages—It does not appear by the Verdict, how far the Jury gave it upon the *Bill*; and how far, upon the whole *Circumstances* of the Case taken together.

The End and Tendency of these two Indictments was to drive this Plaintiff from his Business of a Poulterer, after having long carried it on. This was sworn to have been the Prosecutor's View in preferring them. And they might affect the Man's *Credit*.

There are many Circumstances which make it reasonable, not to indulge the present Defendant in sending it to a New Litigation, only to abate the *Quantum* of the Damages, when he has been so much in the Wrong.

Therefore He was against granting a New Trial.

The THREE Other JUDGES entirely agreed with his Lordship in both Points; and expressed their Sentiments at large, to the same Effect. They likewise agreed with Sir Fletcher Norton, as to the Grounds of this Sort of Action; viz. "That Malice, (either express or implied,) and the Want of probable Cause must both concur". But they were clearly of Opinion, that it appeared upon the whole State of the Evidence, that in this Case they did Both concur. Therefore They thought the Rule ought to be discharged; Both Objections being sufficiently answered.

* See 6 Mod.
25. and 73.
accord.

Per Cur'. unanimously—

RULE DISCHARGED.

Wilson,

Wilson, Widow, *versus* Sir Thomas Sewell, Knt. Master of the Rolls. Tuesday 25th
Nov. 1766.

THIS was a Question concerning the Validity of two Leases made by Sir *Thomas Clarke*, late Master of the Rolls; One, in 1755; the Other, in 1762.

It had been long and often litigated; and in different Shapes.

It first came before the Court upon a Special Verdict, in an Ejectment brought by *John Doe*, on the Demise of Sir *Thomas Sewell*, against *Edmund Wilson* Esq. and was argued by Mr. *Ashurst* for the Plaintiff, and by Mr. *Dunning* for the Defendant, on Friday 15th November 1765; after which, it stood for further Argument. And on Thursday 23d January 1766, Lord MANSFIELD mentioned, that it might perhaps be desirable to the Parties, to have it judicially determined, “Which of the two “Leases (*viz.* of 1755, or of 1762,) was the subsisting Lease:” Which Question, as the Matter then stood, might happen not to be determined. He proposed, therefore, to have that Question brought before the Court, at the same Time with the other, by a fictitious Issue. Which Sir *Fletcher Norton*, on behalf of Sir *Thomas Sewell*, and Mr. *Dunning* on Behalf of the Defendant *Wilson*, then agreed to.

Afterwards, on Thursday 6th February 1766, on Lord MANSFIELD’s inquiring “what was become of this Case,” Sir *Fletcher Norton* answered, “that the Issue was before Counsel.” He added, that He believed they should drop the Verdict, and proceed upon the Issue. Lord MANSFIELD replied, that he thought they were right.

Accordingly, a feigned Issue was settled; and a Special Verdict found upon it.

It must be noted, that in this new Method of Proceeding, the Names of the Plaintiff and of the Defendant were reversed. Sir *Thomas Sewell* was the Lessor of the Plaintiff, upon the former Proceeding; and *Wilson*, the Defendant: But now, *Wilson*’s Widow was made Plaintiff; and Sir *Thomas Sewell*, Defendant.

The feigned Issue was upon a supposed Wager concerning these two Leases. The Declaration contained two Counts: And Issue was joined on each. In the former, *Mary Wilson* is alledged

alleged to have affirmed "that the Lease of 1755 was a good
 " valid and subsisting Lease for the then Residue of the Term :"
 Which Sir *Thomas Sewell* denied. In the latter, she is alleged
 to have affirmed the like concerning the Lease of 1762 :
 Which Sir *Thomas* also denied. So that Issue was joined on
 both Counts.

The Special Verdict finds, as follows. First, It finds the Act
 of Parliament made on the 25th of *April Anno 12 Car. Regis 2di.*
 N^o. 49. "An Act empowering the Master of the Rolls for the
 " Time being to make Leases for Years, in Order to new-build
 " the old Houses belonging to the Rolls." Which Act, after re-
 citing "that the Mansion-House Ground and Tenements with
 " the Appurtenances belonging to the Master of the Rolls as
 " Master of the Rolls are much out of Repair, and not capable
 " of Improvement in Regard the former Masters of the Rolls
 " were not enabled to grant such Leases and for such Terms as
 " might encourage Tenants to build and to repair," does there-
 fore enact "that the Master of the Rolls for the Time being,
 " and his Successors Masters of the Rolls, shall have good Right
 " full Power and lawful Authority, during the Time he or
 " they shall continue Master of the Rolls, by Writing indented
 " under Hand and Seal, to grant and make Leases for *one and*
 " *forty Years* or for any lesser Term, to commence from the
 " Making of any such Leases, of all and singular the Premises
 " or any Part thereof, (the Chappel of the Rolls, with a con-
 " venient Mansion-House Court-Yard Garden Stable Coach-
 " House and other Out-Houses and Buildings fit for the Use
 " and Habitation of the Master of the Rolls, only excepted :)
 " Which Lease and Leases so to be made shall be good and effec-
 " tual in Law to all Intents and Purposes, as if such Master of
 " the Rolls for the Time being as shall so make the same had
 " been seised of the Premises of a good Estate in Fee-Simple.
 " Provided that in Leases where Provision is made for new
 " Building of Houses or Tenements, the yearly Rent of
 " twenty Shillings at the least shall be reserved upon every
 " Lease of such a Quantity of the said Premises as shall be set
 " out and assigned by the Master of the Rolls for the Time be-
 " ing for any one House or Tenement to be built upon; and
 " that in Leases where there is no Provision for new Building,
 " the like usual Rent that hath been paid or reserved for the
 " greater Part of seven Years now last past, or more, shall be
 " yearly reserved. PROVIDED also that the Master of the Rolls
 " for the Time being, or any succeeding Master of the Rolls,
 " after the Premises have been once letten according to the
 " Power given as aforesaid, shall *not* grant or make any NEW or
 " CONCURRENT Lease, until within *seven Years of the Expira-*
 " *tion* of the Lease then in being; nor for any lesser Rent than
 " was

“ was reserved upon the former Lease; nor for any longer Term
 “ than for the Term of *one and twenty Years from the making of*
 “ *such Lease.*

Then the Verdict finds the Grant of the Office to Mr. *Verney*, dated 9th *October* 12 G. 2. And that the said *John Verney*, so being Master of the Rolls, in Pursuance of the Power and Authority given him by the said Act of Parliament, afterwards and before the making of the Lease in the first Count mentioned, to wit, on 18th *March* 1740, did make a Lease to Mr. *Robert Harley* and Mr. *Charles Frewen*, (the Tenor of which Lease they find,) of a Part of the Premises (Serjeant *Skinner's* House,) for 21 Years from the Making; at the yearly Rent of three Pounds. And the Jury find these to be the same Premises as are specified in the Declaration.

The Verdict then finds the Death of Mr. *Verney*, on 10th *August* 1741; and the Grant to * Sir *Thomas Clarke*, dated 29th *May* 27 G. 2.

* N. B. Sir T. C. was not the immediate Successor to Mr. Verney. For, Mr. Justice William Fortescue, third Judge of C. B. succeeded Him, in Michaelmas Term 1741. He died on 16th December 1749; and was succeeded by Sir John Strange. Sir John Strange died on 18th May 1754: And Mr. Clarke kissed Hands and was knighted on 18th May 1754.

It then finds, that Sir *Thomas Clarke*, so being Master of the Rolls, in Pursuance of the Power and Authority given Him by the said Act of Parliament, did on 9th *June* 1755 make a Lease to Mr. *Charles Deaves* and Mr. *John Harrison*, (the Tenor of which is found,) of the same Premises (then in the Occupation of Sir *Samuel Prime*,) for 21 Years from the Making; at the yearly Rent of three Pounds. This Lease not only recites the Act of Parliament, (which was also recited in Mr. *Verney's* Lease,) but it also recites Mr. *Verney's* Lease to *Harley* and *Frewen*, and “ that *more than fourteen* Years of it are already “ elapsed; so that the said Lease is at this Time *within less than* “ *seven Years of expiring.*” And the Jurors find this Lease of 9th *June* 1755 to be the same Lease, and comprizing the same Premises, as are mentioned in the *first* Count of the Declaration.

They find that *John Harrison* died, after the Execution of the said Indenture of 9th *June* 1755, and before the Execution of the Indenture of Lease next after mentioned; to wit, on 1st *September* 1755; and *Charles Deaves* survived Him.

They further find, that the said Sir *Thomas Clarke*, so being Master of the Rolls, did afterwards, to wit, on 5th *January* 1762, make a certain *other* Indenture, purporting to be a Lease

between Him the said Sir *Thomas Clarke* and *Samuel Seddon* and the said *Charles Deaves*, (which they also find the Tenor of,) demising the same Premises to them for 21 Years from the Making; at the yearly Rent of three Pounds. This Lease likewise (as well as the former, of 9th June 1755,) recites the Act of Parliament, and Mr. *Verney's* Lease to *Harley* and *Frewen*; and "that more than fourteen Years of it are already elapsed; so that the said Lease is at this Time within less than seven Years of expiring." And they find, that this Indenture of 5th January 1762, is the same Indenture as is mentioned in the last Count of the Declaration; and the Premises comprized in it, and in the Lease dated 18th March 1740, and in the Lease of 9th June 1755, are one and the same Premises. And they find that *Seddon* and *Deaves* did, at the Time of the Execution of the said Indenture of Lease dated 5th January 1762, execute a Counterpart of it to Sir *Thomas Clarke*.

They find, that Mr. *Deaves*, the then surviving Lessee in the Lease of 9th June 1755, afterwards did make an Indenture of Surrender between Him and the said *Thomas Clarke*: Which Indenture, under *Deaves's* Seal, and duly executed by Him, was produced in Evidence, and is found in *hæc Verba*. It is dated 4th January 1762. This Surrender includes many other Rolls-Leases besides the Subject of the present Question: And it recites "that they were made to *Deaves* and *Harrison*, in Trust for Sir *Thomas Clarke* his Executors and Administrators; and that *Harrison* was dead, whereby the Estate and Interest became vested in *Deaves* in Trust as aforesaid; and that Sir *Thomas Clarke* was desirous that they should be surrendered to Him, the better to enable Him to grant new Leases thereof." And they find that Sir *Thomas Clarke* accepted of this Surrender. And they find, that the said Indenture of Lease dated 9th June 1755, of the Premises, to the said *Deaves* and *Harrison*, is One of the Indentures of Lease mentioned in the said Surrender, and thereby surrendered by said *Deaves* to Sir *Thomas Clarke*. But they find, that the said Indenture of Surrender, though bearing Date and purporting to be made the fourth Day of January 1762, was NOT IN FACT EXECUTED until and upon the fifth Day of June 1764.

They find, that Sir *Thomas Clarke* died on 13th November 1764; and the King granted the Office to Sir *Thomas Sewell*, by his Letters Patent under the Great Seal, bearing Date the 4th of December in the fifth Year of his Reign. And they find the Premises to be Part of the Estate belonging to the Office of Master of the Rolls, and mentioned in the Act as belonging to the Master of the Rolls for the Time being, as Master of the Rolls.

But whether &c. If it shall seem to the Court, that the Lease mentioned in the *first* Count was a good valid and subsisting Lease for the then Residue of the Term, then they find so, and assess the Plaintiff's Damages at 10*l.* and Costs, 40*s.* And they find the like, as to the Lease mentioned in the *second* Count. But if it shall appear to the Court, that the Lease mentioned in the first Count was *not* a good valid and subsisting Lease &c, then they find "that it was *not*," as the said Sir Thomas hath above in pleading alledged. And the like, upon the *second* Count.

The very short State of the Case is no more than this—Mr. Verney made a Lease for 21 Years from 18th March 1740: Which would consequently expire on 18th March 1761. Sir Thomas Clarke made a Lease of the same Premises, on 9th June 1755, for 21 Years, in Trust for Himself: And on 5th January 1762, he made another Lease of the same Premises for 21 Years, in Trust for Himself. On 5th June 1764, there was an actual Surrender, duly executed and accepted, of the Lease of 1755. Sir Thomas Clarke died. Sir Thomas Sewell, now Master of the Rolls, disputes the Validity of either of these two Leases, of 1755, or 1762. All this Matter appeared at full Length, upon a Special Verdict.

The Questions were Three—

1st. Whether the Lease being made *in Trust for Himself*, was not a Fraud upon the Trust; and therefore void.

2dly. Whether the Lease of 1762 was not void, because there were *more than seven* Years to run, of the Lease of 1755.

3dly. If the Lease of 1762 was void, whether the Lease of 1755 was not absolutely gone; either by the *implied* Surrender in 1762, or the *express* Surrender in 1764.

On Friday 21st November 1766, Sir Fletcher Norton argued for Sir Thomas Sewell; and his Argument proceeded on the Tuesday following: Mr. Morton argued for the Nominal Plaintiff; (for, in reality, the Dispute lay between the Representatives of Sir Thomas Clarke, and the present Master, Sir Thomas Sewell.)

And on this latter Day, THE COURT delivered their Opinions *seriatim*.

As to the first Point—They held, that its being *in Trust for Himself* was no Objection. It makes no Difference, with Regard

to the Successor: He will receive the accustomed Rent; and if the Lease is in all other Respects regular, it signifies Nothing to the Successor, whether One Person or Another gets the beneficial Profit upon it.

As to the second Point, (which turned upon the Construction of the Act of Parliament of 12 C. 2.)—They All held that the Lease of 1762 was a good *valid* and *subsisting* Lease. They thought that the Words “*New*” and “*concurrent*,” which are used in the Act of Parliament, meant the same Thing: (Except Mr. Justice *Hewitt*, who did not deliver any Opinion on this Question.) They did not think it necessary that the former Lease must be *run out* within seven Years of its Expiration by *Effluxion of Time*, (which was the Doctrine that Sir *Fletcher Norton* would have advanced;) but that a former Lease might be *surrendered* at any Time, and that a *Surrender* was as much within the given Power, and within the Intention of the Legislature, as *Effluxion of Time*; and that they meant no more than to give every Master of the Rolls for the future, a Protection from being incumbered for a longer Time than 21 Years, by the Leases of Predecessors. They thought, consequently, that this Lease of 1762 did not break in upon the Power; as it does not charge the Reversion longer than 21 Years in the Whole. And it was observed by Lord *Mansfield* and by Mr. Justice *Hewitt*, that as this Estate was in *Houses*, it might happen to be very inconvenient, if the Tenants might not surrender their Leases within less than the last seven Years of their Terms, in order to rebuild their Houses, in Cases where it might be necessary. And it seemed to be their Opinion, that the Master of the Rolls might take Surrenders and make Re-Grants, *toties quoties*: And that his having executed the Power once, did not prevent him from repeating it.

As to the third Point—They held the Acceptance of the Lease in 1762 to be an *implied Surrender of the Old Lease in 1755.

* V. Co. Litt.
338 Hutton
104, Watt v.
Maydewell.

But they seemed to agree, that *if* the Lease of 1762 had *not* been a good Lease, then the Acceptance of it would *not* have implied a Surrender of the former One of 1755. For, it was not reasonable in itself, nor could it be the Intent of the Parties, that an Acceptance of a bad Lease should be an implied Surrender of a *good* One. This is not only agreeable to Principles and Common Sense, but has been determined: It was so resolved in the Case of *Lloyde and Gregory*; (which is best reported in Sir *William Jones* 405. 406.)† If a Surrender is intended for a particular Purpose; and that Purpose, the only Motive of it, fails; the Surrender ought to fail too.

† See also the
Cases cited at
the End of
Watt v.
Maydewell,
in Hutt. 105.

Upon the Whole—

THE COURT concurred in giving

JUDGMENT for the *Plaintiff*, upon the Issue on the Validity of the Lease of 1762; and for the *Defendant*, upon the Issue on the Validity of the Lease of 1755.

Lake, Esq. Sheriff of Hertfordshire, *versus* Turner and Harley, Esqrs. (Roll 498.)

THIS was an Action of Debt for 464 *l.* 7 *s.* 6 *d.* upon the Statute of 29 *Eliz. c.* 4. “to prevent Extortion in Cases of Execution,” brought by the Plaintiff, as Sheriff of *Hertford*, against the Defendants, Sheriffs of *London*, for his Poundage upon a *Testatum Capias ad satisfaciendum* prosecuted by them out of the Court of Exchequer, against one *George Gibbs*, for a Debt of 18473 *l.* 2 *s.* at their Suit, as the King’s Debtors; upon which Writ, the Plaintiff had arrested the said *George Gibbs*: Whereby he became intitled to demand and have of the Defendants the aforesaid Sum of 464 *l.* 7 *s.* 6 *d.* that is to say, twelve Pence for every twenty Shillings of 100 *l.* Parcel of the said Debt and Damages, and Six-pence for every twenty Shillings of the Residue of it.

The Defendants in their Plea set forth a Prosecution by the Attorney General on Behalf of his Majesty, in the Court of Exchequer against *Charles Gibbs*, for Customhouse Forfeitures and Penalties; whereupon Exchequer-Process issued against the said *Charles Gibbs*, directed to them; by Virtue of which Process they arrested Him, and took Bail for his Appearance. That *George Gibbs* was his Surety upon this Occasion, and executed a Bail-Bond to them in the Sum of 18473 *l.* 2 *s.* conditioned for *Charles Gibbs*’s Appearance at the Return of the Writ. That *Charles* did not appear. Whereupon they put the Bail-Bond in Suit in the Exchequer, and recovered against *Charles* the said 18473 *l.* 2 *s.* Debt and 56 *s.* 8 *d.* Damages: And upon this Judgment they prosecuted the said *Testatum Capias ad satisfaciendum* against the said *George*. And they aver “that the aforesaid Judgment against the said *George Gibbs* was had and obtained, “and the said Writ of *Capias ad satisfaciendum* was prosecuted by “them, at the Instance and on the Behalf and Account and for “the Benefit of his said MAJESTY, and at his said MAJESTY’s “Costs and Charges:” Whereof the said *Bibye Lake*, (the Plaintiff,

tiff,) at the Time of the Delivery of the said Writ to Him to be executed, had Notice.

To this Plea the Plaintiff demurred: And the Defendants joined in Demurrer.

Mr. *Afsurst*, on Behalf of the Plaintiff, argued that this was a bad Plea.

Nothing appears to vary this Case from the general Rule.

1st. This is *no Trust* for the Crown.

2dly. *This Court will not take Notice of a Trust.*

First—The Act of 23 H. 6. c. 10. § 1. does not make the Sheriff liable to an Action. 2 Saund. 59. *Posterne versus Hanson and Hooker, Vic. Midd.* 2 Mod. 177. *Ellis versus Yarborough.* 1 Mod. 239. *Page versus Tulse.* The not bringing in the Body at the Return of the Writ, is not actionable: It is an Offence against the Court only, and amerceable by them. The Sheriff is *not* therefore considered as a *Trustee* for the Party; nor, in this Case, for the Crown. There is no Difference between the Case of the Crown, and the Case of the Subject.

This was so before 4 Ann. c. 16. (which made Bail-Bonds assignable.) That Act makes no Alteration: It does not oblige the Plaintiff to take an Assignment of the Bail-Bond. His Remedy still is, by moving for Issues. The Bail-Bond belongs to the Sheriff: He takes it for his own Indemnity.

Secondly—This Court can not *take Notice* of a Trust. And here, the Crown's Interest does not at all appear to the Court.

Mr. *Wallace contra*, for the Defendants.

The Act of Parliament upon which this Action is founded, is 29 Eliz. c. 4. But the *Crown* is not within it. No Demand has ever been made upon the *Crown*, on that Act.

The Act of 3 G. 1. c. 15. gives Fees to Sheriffs, on Levies &c*. But the Money must first be accounted for, in the Exchequer. The Crown therefore is not within the Act.

* Sect. 3. 13.
16. 17.

The Question here is, "Whether this *be* the Suit of the " Crown, or the Suit of a private Person."

Now

Now, it is, in Substance, the Suit of the Crown: And it is averred to be so.

The Plaintiff has his Election, either to accept of the Bail, or to proceed against the Sheriff by Amercement. 12 *Mod.* 447. *Pickering's Case*. 1 *Salk.* 99. *pl.* 6. 10 *W.* 3. *Etherick* versus *Cowper*. 2 *Salk.* 608. *Rex* versus *Daws*. *Raymond* moved that further Amercement might be stayed; and that the Prosecutor might accept of the Bail-Bond. And the Court held that They could not *oblige* the Plaintiff to accept the Bail-Bond. But here the Crown has elected to proceed against the Bail.

The Act of 4 *Ann.* c. 16. does not extend to the King; nor does 23 *H.* 6. c. 10. This is a Trust under 23 *H.* 6. c. 10. And this is averred to be a Suit and Proceeding for the Benefit and on Account of the Crown: And "that the Plaintiff had " Notice of this," is agreed by the Plea and Demurrer.

Therefore the Defendants ought not to be subject to this Payment.

Mr. *Asbursft*, in Reply—Acknowledged that the Crown was not named in the Act; and therefore not bound by it. But it would be a hard Case, he said, upon the Sheriff, if he was to lose his Poundage. And this is so far from having been thought reasonable, that the Act of 3 *G.* 1. c. 15. § 3. gives the Sheriff *larger* Poundage in the Case of the Crown, than in the Case of a Subject.

As to any Admission made by our Demurring, the Answer is, that Nothing is admitted by a Demurrer, but what is well pleaded. And We demur, because We say "That the Facts " pleaded do not warrant the Inference:" We say the Sheriff was *not* a Trustee for the Crown.

As to the Case of *Etherick* versus *Cowper* in 1 *Salk.* 99.—It does not impeach my Doctrine; neither does *Daws's Case* in 2 *Salk.* 608. (which rather makes for me.)

As the Crown has not interfered, the Sheriff of *Hertfordshire* ought not to be deprived of his Fees.

The Plaintiff's having had *Notice* "that the Crown was concerned in Interest," is not a Matter that We could have taken Issue upon.

THE COURT agreed, that if the Crown be not named in an Act of Parliament, it is not bound by it. But, they were unanimous, That this could *not*, in any Light, be considered as the *Suit of the Crown*. The Bail-Bond was taken in the Name of the Sheriffs: And it was their own Security. It was incumbent upon them to take good Security.

The Statute of 33 H. 8. c. 39. § 4. requires all Suits for the Recovery of any of the King's Debts, to be brought "in the Name of the King, only:" Whereas this is brought in the Name of the *Sheriffs*.

Per Cur'. unanimously—

Judgment for the Plaintiff.

Wednesday
26th Nov.
1766.

Rex *versus* Inhabitants of Llandverras.

See this *Case at large*, in the Quarto-Edition of my SETTLEMENT-CASES. N^o. 184. p. 571.

Thursday 27
Nov. 1766.

Sadler *versus* Evans: Or Lady Windfor's Case.

A Motion having been made, on Behalf of the Plaintiff to set aside a Non-Suit—

On the last Day of *Easter Term* last (1766,) Mr Justice *Aston* reported from Mr. Paron *Perrott* who tried the Cause, That this was an Action for Money had, and received to the Plaintiff's Use; and that the Counsel for the Plaintiff, who opened the Cause at the Trial, stated the Action to be brought with *Intention to try the RIGHT* of Lady *Windfor* to a Quit-Rent of One Shilling, and to another Sum of Six-pence for Mises. They stated, that the Defendant was her *Receiver*; and demanded them of the Plaintiff, *as such*. That the Plaintiff paid the 1s. 6d. to the Defendant; and took a Receipt for them, by which, the Defendant acknowledged to have received them for the Use of Lady *Windfor*. That, in Fact, these Sums were *not due* to Lady *Windfor*; and that they were therefore received without any good Consideration; and consequently, that *this Action* well lay against the Defendant into whose Hands they were paid.

And they were prepared with, and would have called Evidence to the RIGHT.

But the Judge (Mr. Baron *Perrot*) was of Opinion, that under these Circumstances, the *Action did not lie* against the Defendant. That Nothing could be more absurd than to make the *Collector* or *Receiver* of another Person liable to an Action for every Payment that was *voluntarily* made to Him; and to leave Him to be defended, or deserted, by his Principal, as such Principal should think fit. That it was (in his Opinion) yet still more absurd, as He did not see how a Verdict given in this Cause could ever be received in Evidence for or against the Right which might in a future Cause come to be tried. That if this Action lay in such a Case as this, it would lie against every Attorney who by his Client's Direction should demand and receive Money as due to his Client, which the supposed Debtor might *voluntarily* pay, and afterwards think fit to dispute. He thought that if the One Shilling and Sixpence had been paid over to Lady *Windsor*, the Plaintiff might easily prove it: And if it was not paid over, yet the Payment to her Receiver was Payment *to Her*; And therefore the Action ought to have been brought against *Her*.

He therefore ordered the Plaintiff to be called; remembering the Case* of Mr. *Kynaston's* Collector; against Whom the like Action was brought, to recover back a Customary Payment for Tythes; and the Plaintiff was non-suited by Lord Chief Justice *Lee*, upon this Principle (as the Baron understood) "That the Right to an Inheritance should not be tried in an Action for Money had and received, brought against the Receiver or Collector." For, whether the Money had or had not been paid over to his Principal, *that* could not be the Ground of Lord Chief Justice *Lee's* Opinion; (as Mr. Baron *Perrott* thought) being a Matter merely in the Knowledge of the Principal and Receiver: And to make the Action maintainable or not, just as that Fact should appear on the Trial, would make this Kind of Action a Trap for the Plaintiff.

* The Name of this Case was *Staplefield v. Hugh*, or *Yewd*, in 1753. at Guildhall.

The Baron acknowledged that He was the sole Occasion of the Nonsuit; and that it was against the Opinion of the Plaintiff's Counsel: And therefore he very candidly declared his With, that if He was wrong in his Opinion, the Non-suit might be set aside.

It was objected, on Behalf of the Defendant, "that a Non-suit *could not* be set aside."

* V. Lucas
315. S. C.
But it is only
an Account of
the first Mo-
tion, in P. 1.
G. 1.

LORD MANSFIELD mentioned two Cases to shew "that a
" *Non-suit may be set aside* by the Court;" viz. *Temple*
versus *Welds*, M. 2. G. 1 *. and *Bagshaw* versus *Wynn*,
Scacc. Tr. 13 G. 2. 1739. He had no Apprehension,
He said, that a Non-suit might not be set aside, upon
proper and sufficient Grounds, properly supported. And
they must be very strong Cases that would alter his Opi-
nion about it.

Mr. Serjeant *Nares*, of Counsel for the Defendant, thereupon
† N. B. This cited some Cases to shew that it *could not*. 1 *Barnes*, † *Love* ver-
Case is exact- sus *Day*, pa. 226. M. 7 G. 2. and 2 *Barnes*, *Hartley* als. *Green*,
ly S. P. with versus *Atkinson*, pa. 255. M. 25 G. 2.
Temple v. *Welds*;

though determined directly the Reverse. The latter Case, in 2 *Barnes*, is thus—"Per Curiam: The
" standing Rule is, that if a Non-suit be regular, the Parties are out of Court, and it *cannot* be set aside."

Mr. *Price*, *contra*, (for the Plaintiff,) cited *Casely* versus *Evans*.
M. 29 G. 2. B. R. where a Non-suit *was* set aside. [I do not
find this Case amongst my Notes of that Term.]

Adjourned.

THE COURT, on *Thursday* 12th *June* last, were unani-
mous, that upon the Facts stated in the Report, the Plaintiff
ought *not* to recover against the Defendant, in this Action; and
that the Action ought to have been brought against *Lady Windsor*
Herself, and not against her Agent: And therefore they discharged
the Rule for setting aside the Non-suit. They thought, the
Principles upon which Actions for Money had and received to
the Plaintiff's Use are founded, did not apply to the Circum-
stances of the present Case. It is a liberal Action, founded upon
large Principles of Equity, where the Defendant can not con-
scientiously hold the Money. The Defence is any Equity that
will rebut the Action. This Money was paid to the known
Agent of *Lady W.* He is liable to Her for it; whether He has
actually paid it over to Her, or not: He received it for Her.
And *Lord Mansfield* expressed a Dissent to the Case of *Jacob* ver-
sus *Allen*, in 1 *Sa. k.* 27. and his Approbation of *Pond* versus
Underwood, in 2 *Ld. Raym.* 1210. 1211. which is contrary to
it. He said, He kept clear of all Payments to third Persons, but
where 'tis to a known Agent: In which Case, the Action
ought to be brought against the Principal, unless in Special Cases,
(as under Notice, or *malâ Fide*.) But They were unanimous,
both upon Principles and Authorities, that where a Judge at
Nisi prius non-suits the Plaintiff, and is mistaken; the Court,
upon Motion, *may set aside the Non-suit*.

RULE DISCHARGED.

In

In the following Term, *viz.* on *Thursday* the 13th of this Month, another Question came before the Court, in the same Cause; but of a quite different Nature from the former; namely, “Whether, when a Cause *remains untried*, without any Fault “in *either* Party, the Costs of this going down to Trial shall “be paid by the unsuccessful Party to the Party finally succeeding in the Cause, (as the other Costs are;) or, Whether Each “Party shall abide by his own Costs, occasioned without the “Default of either.”

Sir *Fletcher Norton*, on Behalf of the Plaintiff, moved that the Master might review his Taxation of Costs, in which he had *allowed* these Costs of the *Remanet*, as well as the Rest; and in the mean Time Proceedings to stay.

Sir *Fletcher* stated, that a Writ of Error had been brought and *non pros'd*: So that the Record is now come back hither again, and this Objection is still open to the Plaintiff. The Court are still Masters of their own Record: Which would not have been the Case, if the Judgment had been affirmed both as to Debt and Costs.

His Objection to the Taxation was, that his Client ought not to be obliged to pay these Costs occasioned merely by the Cause having stood over at the first Assizes, as a *Remanet*, without his Client's Fault. A Cause going off upon a *Remanet*, ought (he said) to be *excepted* out of the general Rule.

Lord MANSFIELD seemed at first to think “That if “neither Side were in Fault, *neither* Side should pay Costs.” And this was made a *Remanet*, for Want of Time to try it.

BUT THE COURT and Master OWEN agreed to the *general* Rule “that Costs are to be paid, where the Cause goes off upon “a *Remanet*; as well as any other Costs in the Cause;” and instanced in some *Maidstone*-Causes, which went off for Want of Viewers; so that neither Party was in Fault.

Mr. Serjeant *Nares* and Mr. *Stowe*, on Behalf of the Defendant, now shewed Cause against the Master's reviewing his Taxation.

Their Writ of Error is *non-pros'd* at our Expence.

They come too late: They ought to have applied in Time. There has been Judgment of Discontinuance, so long as a Twelve-month

month ago: And the Costs have been taxed, with this Allowance of the Costs of a *Remanet*.

The Court can not alter the Judgment *now*; it being above a Term *after* Judgment was given. *Yelv.* 45. *Perfival* versus *Spencer*. 1 *Bulstr.* 49. *Hoblins* versus *Kimble*. Sir T. Raym. 38. *Ellison* versus *Ellison*—A Judgment can not be altered *after* the Term. *Carthew* 167. *Cbetle* versus *Lees*. 2 *Stra.* 1110. *Wray* versus *Lifter*—The Court refused to permit the Plaintiff to *remit* Surplus-Damages; because it was in *another* Term.

Sir *Fletcher Norton* and Mr. *Price*, *contra*, for the Plaintiff, argued in Support of the Rule for the Master to review his Taxation of Costs upon the Non-suit. They said, that on the *Merits* of the Case, it ought to be done. And the Plaintiff was, in all Respects ready to go on to Trial. This is a very hard Case: And the Plaintiff has had 90*l.* and upwards for *One Remanet*, and *One* Trial.

If a Cause goes off upon a *Remanet*, they agreed that the general Rule is “that the Costs shall attend the *Event* of the “Cause.” And they admitted, that in the Case of *Standen*

* This Cause versus *Hall*, P. 29 G. 2. B. R. a general Rule was laid down. of *Standen*, ex *Dimiss*. But every general Rule admits of *Exceptions*: And the present Case ought in Reason to be excepted. *Wheatley*, v. *Hall*, went

off upon a *Remanet* without any Default whatsoever in either Party: And it was argued “that where neither Party was in Fault, *neither* ought to be punished in Costs.” But the Court thought it depended upon the *Practice*: And Master *Clarke* certifying “that it was his Practice to *allow* them,” the Rule to shew Cause why he should not review his Taxation was discharged. And Mr. Justice *Forster* said it was the right Method.

I have also a Note of a prior Case, *Price*, ex *Dimiss*. *Cuthbert*, v. *Birt*, in Trin. 1742, 16 G. 2. B. R. where the Cause went off *pro Defectu Juratorum*: And the whole Court agreed “that these Costs ought to “be allowed as Part of the Costs of the Suit.”

Note. On the *Crown-Side*, it is the Practice to *allow* them. In C. B. the Prothonotaries did *not* use to allow them: But, on 7th July 1767, I was informed “that the Court of C. B. had determined to come into “the Practice of this Court for the future.”

As to Coming in Time—Here was a Writ of Error depending: And We obtained a Conditional Rule, “That upon quashing “our own Writ of Error, We should have Liberty to move to “set aside the Non-suit.”

As to the Cases cited from *Yelverton* and *Carthew* and *Bulstrode*—They were Error upon the Face of the Record: And the Court would not amend.

This Case of Costs, (which are given by Statutes,) differs from Damages: And increased Costs are considered as a *Penalty*. *Carthew* 179. *Coan* versus *Bowles*—Costs are *stricti Juris*, “and “in the Nature of a *Penalty*.”

The Cases cited are upon *Damages*, (*not Costs*;) which are the Act of the Jury: But the increased *Damages* and the *Costs* are the Act of the Court; and the Court may rectify them at any Time. Here the Court (by their Officer) have given more *Costs* than They ought: And therefore the Court may now rectify it.

LORD MANSFIELD—On the Merits of this Question (“What *Costs* ought here to have been allowed—”) I think that *General Rules* imply an Exception, in Cases where the general Rule is used for Oppression, or where the Hardship of the particular Case is such as that it would be manifestly unreasonable and unjust to include it within the general Rule; *provided* the Application is made *within due Time*. And if this had come *recently* before the Court, I should have thought that the Plaintiff ought *not* to pay the *Costs* of the *Remanet*. For, it appears that the Defendant treated the Cause as likely to be of great Length; though he intended to non-suit the Plaintiff, by an Objection which he kept in Reserve: And this put the Plaintiff to a great Expence. The Defendant likewise pretended “that it was a “great Damage to Him, that the Action was brought against “Him, and not against Lady *Windsor* ;” when, in Fact, Lady *Windsor* was the true defendant, and at the whole Expence. So that it was a Snare laid, to prevent trying the Right. Therefore, I should have inclined, upon a recent Application, to have made this Case an Exception from the general Rule; allowing the general Rule to be right.

But the Application is now made a Year *after* a Judgment; and after a Writ of Error brought, and that Writ of Error *non pros’d*.

The Cases cited by Mr. *Stowe*, of *Capiatur & Misericordia*, are not now Law. They have been cured, upon Account of their unreasonable Strictness.

If a manifest Miscomputation, or any plain Mistake in Figures should appear on the Face of the Record, with regard to *Costs*, I should think it might be amended: As (for Instance) if the *Damages* had been said to be 60*l.* and the *Costs* 30*l.* which amount in the Whole to 100*l.*

But here is no such manifest Miscomputation or Mistake on the Face of the Record. A proper Distinction has been made between the *Damages* given by the Jury, and the *Costs*. And they certainly come too late: For *Vigilantibus, et non dormientibus, Jura subserviunt*. Every Thing was in their Knowledge, from the first Moment: There is no new Discovery, nor new

- Ground. They should have complained during the Taxation, or in due Time afterwards; or else have shewn that it was not in their Power to do so.

Therefore the Granting this Rule would be a bad Precedent; though in a favourable Case. Favourable Cases make bad Precedents. Therefore, though I am sorry for the Hardship of the Case, yet I am not for granting the Rule.

The THREE Other JUDGES concurred that this was a favourable Case; and if the Application had come in Time, they should have thought it reasonable to except it out of the general Rule.

Here, it is *substantially* altering the Judgment; *not* (as They observed) in a Matter of mere Mistake, but of *Judgment*. Therefore at such a Distance of Time, it would be very inconvenient to alter it: It might be a bad Precedent. And for that Reason, and *that only*, They were against granting the Rule.

Mr. Justice ASTON mentioned a Case from *Ireland*, of *Byrne versus Byrne*, which, He said, overturned all the Cases of *Misericordia*.

The Opinion of THE COURT was shortly this—

The THREE JUDGES agreed with Lord MANSFIELD, that though the general Rule still subsists—"That the Costs of "a *Remanet* ought to *attend the Event* of the Cause;" yet *that* and *every* general Rule must imply an Exception of *particular* Cases under such Circumstances as clearly distinguish them from being within the *Reason and Principle* of the general Rule. And they also concurred that this particular Case was One of those which ought to have been excepted out of the general Rule, if the Application had come in Time. But They were of Opinion with his Lordship, that in the present Case, the Plaintiff had by his own Negligence omitted the proper Opportunity; and therefore had now no Title to Relief; it being his own Fault, that he did not apply within due Time.

Per Cur'. unanimously—

RULE DISCHARGED:

Rex

Rex *versus* Anne Brooke and Thomas Fladgate : Or Friday 28th
Anne Gregory's Case. Nov. 1766.

ANNE GREGORY, the Wife of *Abraham Gregory*, was brought up, upon the Return of a *Habeas Corpus* directed to her Mother and Uncle, which had issued at the Application of *Abraham Gregory* her Husband. She appeared to have been very ill used by her Husband; and to have thereupon fled from Him, and come to the Defendants for Security and Protection: And She was ready to swear, and actually did swear the Peace against Him.

THE COURT would not order Her to be delivered to her Husband, as his Counsel demanded: But on the contrary, told Her "She was at Liberty to go where She thought proper;" and offered Her, and (at her Request) gave her a Tipstaff to secure Her from any Insult in her Return to her Friends.

Rex *versus* Justices and Clerk of the Peace for the County of Derby.

MR. *Blackstone* and Mr. *Morton* shewed Cause, on Behalf of the Defendants, against a *Mandamus* to oblige them to register and certify a *Dissenting Meeting-House* at *Melbourn* in that County.

See the Toleration-Act, 1 *W. & M. St. 1. c. 18. § 1. and § 19.*

1st Objection. *Non constat* what Species of Protestant Dissenters they are of; nor in what Points they dissent.

2d Objection. *Non constat* that it is a House proper to be registered.

3d Objection. They have not brought themselves within the Qualifications of the Act.

See 1 Lord Raym. 125. *Green and fifteen Others versus Pope*; where a *Mandamus* was issued upon this Act of Parliament, directed to the Bishop of *Chester's* Register, commanding Him to register the Certificate of a Place of Meeting of Protestant Dissenters: And an Action was brought for a false Return to it.

Lord

LORD MANSFIELD—No Inconvenience can attend the registering this Meeting-House. The Registry and Certificate do not prove “that They are within the Act:”—They will still be obliged to shew that They are within the requisite Qualifications, if called upon; notwithstanding the Register and Certificate. And if, in Fact, They are not within the Qualifications, the Justices may return “that they are not,” if They think proper to do so.

Rule made Absolute.

Barclay et Al'. Assignees of John Styles and Copeland Styles, Bankrupts, *versus* Hunt.

THE Question was “Whether the Defendant should be “discharged on Common Bail; upon an Objection to the “Sufficiency of the Affidavit made by the Plaintiffs to hold the “Defendant to Special Bail.”

The Assignees swore to the Debt in these Words—“*As appears to these Deponents, by the last Examination of the Bankrupts; and as these Deponents verily believe.*” And they swore, that they themselves had not received the Debt or any Part of it; and that they believe it to be still due.

The Circumstances of this Case were these. *John and Copeland Styles* were Partners, and became Bankrupts. The Plaintiffs were Assignees under the Commission. This was a Debt due to the Bankrupts from *Hunt*; and was so declared by the Bankrupts upon their Examination, in the following Manner; *viz.* Their second Schedule includes a Debt due from “*Thomas Hunt*, by Balance of an Account 5800 l: And they swore that such second Schedule contained a true Account, to the best of their Remembrance and Belief.”

John Styles resided in *England*: *Copeland* resided abroad, at *Bermudas*, and knew nothing of the Matter. *John*, who alone could swear to the Debt, refused to make Affidavit of it.

Yesterday, (27th November 1766,) Mr. *Stowe* shewed Cause on Behalf of the Plaintiffs, why the Defendant should *not* be discharged on Common Bail.

There are *two* Causes. One of them was brought in the Mayor's Court in *London*; and the Defendant has *removed* it by

Habeas Corpus, into this Court. Therefore, by the Course of the Court, the Defendant must put in Bail here.

As to the other Cause, which is brought here, and in which this Affidavit is made;—It is the utmost that the Assignees can swear. The Bankrupts have refused to swear to the Debt. *Hunt*, the Defendant, is the Father-in-Law of the Bankrupts. Therefore the Assignees could go no further than they have done. There is a Case in 2 *Barnes* 65. *Tribe et al.* versus *Pratt*; where the Assignees only swore “that the Defendant was indebted to them 1300*l.* as appeared by an Account under the Bankrupt’s Hand:” And the Court thought a positive Affidavit of the Debt necessary; “*Unless* it had appeared, that the Bankrupt refused to make the same.” Here, *he has refused*.

He offered to accept the same Bail as the Defendant had already given to the Sheriff.

Sir *Fletcher Norton* and Mr. *Dunning*, *contra*, for the Defendant—

No Person was by Common Law liable to be arrested by his Body, on mesne Process. Therefore the Defendant ought not to be *deprived of his Liberty*, without Opportunity to defend Himself, unless by positive Affidavit. Therefore the Court have always required a precise positive Affidavit. It has never been *relaxed*, but in the Case of an Executor: In which Case, *No One else can* make such an Affidavit.

The not requiring Bail will not prevent the Plaintiffs having Justice. Perhaps, requiring Bail has done more Harm than Good.

Here, the Bankrupts are both *alive*, and might swear to the Debt, if They should think proper. They refuse: Which *may* be, *because* They may-know there is *no* Debt.

This Examination is only a Schedule of their Debts. They give up their All. But they may mistake. They only swear, even to that Account, “that it is a true Account, to the best of their Remembrance and Belief.” But They can not perhaps be quite precise, as to all the Particulars of it.

Besides, as there are qualifying and restrictive Words in their Examination, *viz.* “to the best of their Remembrance and Belief,” an Affidavit so qualified and restricted would not have been sufficient to hold to Bail. Therefore this, even put all together, is no Proof of a Debt. The Stream can not flow

higher than the Fountain. The Affidavit can receive no additional Strength by the Reference to the Examination: For, the Examination referring the Remembrance and Belief to the *Whole* of it, refers them to *every Part* of it; and consequently refers them to this particular Debt. Whereas the *highest* Degree of Evidence ought to be produced: And here, the Bankrupts Themselves might be had. Therefore this present Affidavit is only the *second* Authority; not the *best*.

* The Reason
given in 2 Str.
1157. Heath-
cote *versus*
Goslin, is
"that De-
fendants may not be harassed."

Barnes's Note, of *Tribe and Others* against *Pratt*, shews that the Bankrupts ought to make the Affidavit: It *can not* be supplied by *any other* Affidavit. It ought to be positive, because it can not be contradicted. And for the same Reason*, it can not be bolstered up or supplied by a *second* Affidavit. We have an Affidavit "That the Bankrupt *can not* swear to this Debt:" He acknowledges that it is a Mistake in his Examination.

Who could be indicted for Perjury, if this Affidavit should be false? Not the *Maker* of it: Not the *Bankrupt*. Therefore No One can. Consequently, such an Affidavit ought not to be regarded, or have any Kind of Weight. It appears, therefore, upon the Whole of this Case, that no positive Debt is sworn to; nor is there any Person that is indictable for Perjury, in Case that which is sworn, should prove to be false.

They cited the following Cases where the Defendants had been discharged on Common Bail. *Pasch. 1754. 27 G. 2. Fludger, Assignee of Jackson, versus Greenwood and Hughes. P. 18 G. 2. Claphamson versus Bowman, 2 Str. 1226. Walrond versus Fransham, 2 Str. 1219. Rios versus Belifante, 2 Str. 1209. Heathcote versus Goslin, 2 Str. 1157. Tr. 23 G. 2. Mill versus Fryer, M. 26 G. 2. Kelly versus Devereux, B.R. and Pomp versus Ludvigson †. Mich. 32 G. 2.*

† V. ante,
Vol. 2. p.

655. where many of these Cases are collected together: And also Vol. 2. p. 1032. Moulby v. Richardson

THE COURT took Time till this Day, to look into the Cases.

CUR'. *advizare vult.*

LORD MANSFIELD now delivered the Opinion of the Court.

We are All clearly of Opinion, that the Affidavit is sufficient to hold the Defendant to Bail.

As to the Case of *Fludyer, Assignee of Jackson, versus Hughes*, in 27 G. 2. cited by Mr. Dunning—He was misinformed. I have two Notes of it; One, taken by my Brother *Yates*; the Other, communicated to Me by my Brother *Aston*. According to the former, the Defendant was discharged on Common Bail; because the Affidavit *only referred* to the Bankrupt's Books, without adding that the Plaintiff *believed it to be true*. Mr. Justice *Aston's* Note of the same Case is, that the Plaintiff made Affidavit "that the Defendant stood indebted &c; *as appears to Him*" "by the Books of the Bankrupt." The Defendant was discharged on Common Bail; the Affidavit being *only* by Way of Reference. And in the latter Note, it is mentioned, that two former Cases were cited; *viz.* **Kelly versus Devereux*, and †*Walrond versus Fransham*; Both of which were given up by Mr. Pratt, *because* the Affidavit was *only* by Way of Reference. We have sent for that Affidavit: And it is thus—"That He" "was indebted &c, *as appears by the Books and Ledger of J. J.*"

*V. ante 655.
in Margine.
† 2 Str. 1219.

It is manifest by a String of Cases ‡, that Words of Reference § never are sufficient in an Affidavit to hold to Special Bail; such Words (for Instance) as these, "as appears by Books or Papers," "or any Thing referred to"; or any other Words of mere Reference.

‡V. ante 655.
a long List of
them.

In the Case of || ——— versus *Vandereft*, P. 3. G. 2. It was || determined "that in the Case of an *Executor*, if the *Executor* swears to the Books, and that He *believes* them to contain a true Account, and that the Debt is still unpaid," it is sufficient to hold to Special Bail.

|| 24. the
Name of the
Plaintiff in
this Case.
I have a
Note of *Elf*
v. Vandereft,
in the very

same Term; and another, in the next Term, of *Lucas v. Vandereft*; but not to the same Point.

In the Case of *Maultby versus Richardson* §, Trin. 1760, § swearing to the Debt, "as the Plaintiff computes it," was allowed to be sufficient.

§ V. ante,
Vol. 2.
p. 1032.

In the Case of *Holmes et al. versus Mendes Cefis et al.* Trin. 1733. * 6 & 7 G. 2. the Plaintiffs were Assignees under a Commission of Bankruptcy, and swore that the Defendant was "indebted to them in 600 l. as appears by the Bankrupt's Books." But the Assignees had *not* there sworn that They *believed* the Debt to be due. Which the Court took particular Notice of; and made the Rule absolute to discharge the Defendant on Common Bail.

* This Case is
not in Sir
John Strange's
Reports;
though the
Rule was
made upon
his motion.

But, on the Reason of the Thing and the Authorities, the Defendant ought in the *present* Case to be holden to Bail; the Affidavit

Affidavit being sufficiently positive, as the Case is circumstanced, to support a Demand of Special Bail.

The Court ought never to lay down a Rule to be construed so rigidly as that it may put unreasonable Difficulties upon the Suitors, and render them liable to Inconveniences worse than those which the Rule was intended to prevent.

As to what Sir *Fletcher Norton* said, "That Bills may have been paid, after the last Examination"—If that were really the Fact, it would not save the Person who should swear in the evasive Manner that this Affidavit would, in such Case, be expressed, either from losing the Security of Bail, or from Criminal Prosecution: He might surely be indicted for Perjury, upon such an evasive Oath, as it would, upon that Supposition, be.

In Dr. *Turlington's* Case, He swore to the Sum due upon One Side of the Account only, without regarding the other Side of it. But that was a mere *Evasion*, and so treated.

So, in a Case from *Plymouth*, there was a like Manner of swearing; and it was considered as a gross *Evasion*: For, the *Balance* is the Point in Question; and neither Side of the Account can be taken by itself, without the other.

Therefore the Rule to shew Cause "why the Defendant should not be discharged on Common Bail," must be "discharged."

RULE DISCHARGED.

Vide post. under *Wednesday 3d February 1773, Crausford versus Whittall*, a Case very similar to *Pomp versus Ludvigson*, ante 655.

Doe, on the Demise of Troughton, *versus* Roe.

A Material Rule was, this Day, made, in an Ejectment-Cause. A Judgment in Ejectment had been regularly obtained by the Plaintiff, against the Casual Ejector, by Default: And the *Landlord* of the Premises had moved to set aside this Judgment; because his *Tenant* had not given Him Notice of his having been served with an Ejectment.

The Plaintiff insisted, that his Judgment was *perfectly regular*; and that the Tenant's omitting to give his Landlord Notice of an Ejectment's being delivered, was a Matter merely between the

the Landlord and his Tenant, which could not affect the Plaintiff's regular Judgment fairly and duly obtained.

THE COURT were, however, clearly of Opinion, that the *Possession* ought not to be *changed* by a Judgment in Ejectment, where there had been *no Trial* or Opportunity of trying; though the obtaining the Judgment might be owing to the Default or even Treachery of the Defendant's own Tenant.

But, if the Plaintiff had not been guilty of any Collusion with the Tenant, they thought it reasonable that the *Tenant*, who was the Person guilty of the Default, should pay the *Costs*. For, the Rule of the Court which requires Service upon the Tenant in Possession, is calculated with a View that the Tenant *should give Notice* to his Landlord, in Order that the Ejectment-Cause may be tried between the proper Parties interested in the Question.

THE RULE was therefore enlarged; and an Order made upon the *Tenant*, to shew Cause why he should not pay the *Costs*.

Upon it's now coming on again—

THE TENANT, by his Counsel, admitted Himself to be in Fault; and submitted to the Court.

THE LANDLORD was an *Infant*; and therefore could not *consent* to the Trial of the Question, (which was Heirship,) in an *Issue*. But as Relief was *on his Behalf* prayed against a Judgment which was strictly *regular*, there could be no Doubt but that the Court might *add such Terms and Conditions* to such Relief, as were just and equitable, by bringing the real Question between the Plaintiff and Him, to be tried upon the *real Merits*.

THE COURT accordingly made the following Rule, *viz.*

Upon reading the last Rule, It is ordered that the Judgment signed in this Cause, and also the Writ of Possession issued and executed thereon, be set aside. And it is referred to Mr. *Owens*, to tax the Lessor of the Plaintiff his Costs occasioned by the said Judgment and taking Possession as aforesaid, together with the Costs of this Application: Which Costs, when taxed, shall be paid by *Charles Douglas Bowden*, the Tenant in Possession of the Premises in Question. And it is further ordered, that

Henry Reynell Spiller, Esq. the Landlord of the said Tenant, be made Defendant, (as in the Conditional Rule;) and that he shall, upon the Trial of the Issue to be joined between the Parties, not set up any satisfied Term or any Trust-Estate, to defeat the Lessor of the Plaintiff; and also admit that *Zouch Troughton* was seised of the Premises in Question.

The End of *Michaelmas* Term 1766, 7 G. 3.

Hilary

Hilary Term

7 Geo. 3. B. R. 1767.

Rex *versus* The Corporation of Wells.

Monday 26th
January 1767.

ON shewing Cause against a Mandamus to be directed to them, commanding to restore *John Burland* Esq. One of His Majesty's Serjeants at Law, to the Recordership, from whence They had removed Him; it was agreed to abide by the Opinion of the Court upon the present Motion. The Facts appeared, on the Affidavits: They were, in Substance, to the Effect following—

His Tenure was "*quam diu se benè gesserit.*" It was a Corporation by Prescription. The Times of holding their Sessions were sufficiently ascertained. The Causes or Grounds of Amotion were two: 1st. An improper Conduct at the Election of Members of Parliament on the 17th of *December* 1765; viz. Administering the Oath to One Mr. *Keate* as returning Officer, as well as to the Mayor, who (they said) was the *proper* returning Officer; and also refusing to suffer the Mayor to adjourn the Poll to the Assize-Hall; but continuing it Himself, together with *Keate*. 2dly. Repeated Non-Attendance. First, *Refusing* to attend at the last *January* Sessions, to be holden upon *Monday* the 13th, though Notice was given Him "to do so," and likewise "that the Sessions could not be holden *without* Him; the Mayor being under a Necessity of being in *London*, and there being only One other Corporation-Justice." And also *neglecting* to attend at the Quarter-Sessions on 7th *April*: At which He had indeed *no particular* personal Notice "to attend," but nevertheless was obliged (as they insisted) by his Duty to have attended, as it was well ascertained to be the *usual* Day of holding this Session.

It appeared upon the Affidavits, that the Name of the Corporation is "Mayor Masters and Burgeses;" and that Mr. *Keate*
I was

was the senior Master, and claimed to preside at the Election of Members of Parliament.

It appeared that the Serjeant's general Residence was, and had for six or seven Years been in *London*; That He came down to *Wells* upon Occasion of this Election, in *December*; That the *January* Sessions happened whilst He continued there; That He did receive the Notice before mentioned; and that, in Fact, He did not attend at it; That he was summoned to appear, and shew Cause why He should not be removed from his Office of Recorder; And that at a Corporate Meeting holden at the Day therein appointed, He was removed.

His Defence was—That whilst He was resident at *Wells*, He was used to attend the Sessions: And since his residing in *London*, He has generally attended them about once a Year. That He now came to the Place as a *Voter* at the Election, and not as a Justice of Peace, or Recorder. That, as to the Sessions on *Monday* 13th *January*, He (being then in the Town) received Notice “That no Sessions could be holden on that Day, by Reason of the Illness of Mr. *Miller*, another Justice, without whose Presence the said Sessions could not be holden, the Mayor being gone to *London*.” That He nevertheless stayed in the Town, in Order to attend: But Mr. *Miller* could not attend, still continuing ill. That, as to the Sessions of the 7th of *April*—He was not then in the Town, nor had Notice of it: And that his Presence was not essentially necessary; there being a sufficient Number of Justices without Him, and their Jurisdiction confined to Contempts &c, and not extending to Felonies; and there being no particular Business ordinarily expected to come before Them.

It appeared, that Mr. *Robert Tudway* was Mayor of *Wells*; Mr. *Keate*, the senior Master; and Mr. *Paris Taylor*, Sheriff of *Somersetshire*. Mr. *Taylor*, the Sheriff, delivered the Precept to Mr. *Keate*: Mr. *Tudway*, the Mayor, demanded it; but Mr. *Keate* refused to deliver it.

Mr. *Tudway*, the Mayor, then ordered Serjeant *Burland*, as Recorder, to administer the Oath to Him (*Tudway*) as Returning-Officer, and not to *Keate*.

Serjeant *Burland* said He would disobey that Order; and, upon his own Motion and Proposal, (as was alledged,) administered the Oath to *Keate*, as well as to the Mayor.

The Mayor thereupon adjourned the Poll to the Assize-Hall: But the Serjeant opposed such Adjournment; and advised and
assisted

affisted in continuing it where it was. In Consequence of which, Two distinct Polls were taken.

It was sworn, that Mr. Serjeant *Burland* acted there as Recorder; and many Proofs or supposed Proofs of it were specified.

Sir *Fletcher Norton*, Mr. *Morton*, Mr. Recorder *Eyre*, and Mr. *Dunning*, on Behalf of the Corporation, now shewed Cause against the Mandamus to restore Serjeant *Burland* to the Office.

They urged two Charges against Him; viz. 1st. *Non-feasance*, or *Neglect* of Duty; and 2dly. *Mal-feasance*, or *Misbehaviour*. And They laid down, as general Principles—That the Body at large have Power of Amotion; And that He is amoveable, for proper Reasons, though appointed to hold *quam diu se bene gesserit*: And they insisted that *these* Matters charged upon Him are proper Reasons and sufficient Causes of Amotion.

First—As to the first Cause of Amotion—They admitted, that his Excuse seemed sufficient for the *January*-Sessions. But, at the *April*-Sessions, it was his Duty to attend; though not a Charter-Day: For it was fully ascertained that the Sessions was usually holden on that Day. Therefore no Notice was necessary: But He must take Notice at his Peril. 9 Co. 50. a. *le Countee de Salop's Case*.

He owns that He was resident, when elected; and that for six or seven Years He has absented Himself, and lived in *London*. This wilful Withdrawing Himself is an Aggravation, rather than an Excuse. He ought to attend his Duty there: And the Non-Attendance is a Forfeiture. Serjeant *Whitaker's Case*, 2 Salk. 435. (third Point,) and 2 Ld. Raym. 1237. proves this.

Notice is not necessary, where the Day of holding the Sessions is known and notorious. Here, the Nature and Duty of his Office, and also his Oath of Office required his Attendance.

But even if it were necessary, the Serjeant has made it impracticable: He has withdrawn Himself to *London*, out of the Reach of Notice, by a voluntary Absence.

This wilful Absence is itself a Cause of Amotion.

Secondly—The second Cause of Amotion is *Mal-feasance*.

He gave improper Advice, both to the Mayor and to Mr. *Keate*. His Conduct on the 17th of *December* 1765 was a direct Breach of his Corporate Duty. It is not true, that He came

only as a *Voter*: He came as Recorder. We have proved this: His *own Act* proves it; for He could not administer the Oath, but as Recorder; nor sign his Name to it, but as Recorder.

He did every Thing that, as a good Recorder, He ought not to have done. The Mayor was the sole returning Officer: And the Precept ought to have been delivered to *Him*, as it was directed. Instead of that, He opposed the Authority of the Mayor; and incited, aided and assisted the Usurper of his Authority.

It was absurd, that the second in Office should preside, when the first was present and claimed to preside, and expressly required the Oath to be administered to Him and Him only. Yet the Serjeant called upon *Keate* to take the Oath, and officiously administered it to Him, as well as to the Mayor.

The Mayor thereupon adjourned the Poll to the Town-Hall. But the Serjeant advised and instigated *Keate* to proceed where He then was. In Consequence of this, two Polls were taken: The Serjeant, when He had read the Precept returned it to *Keate*.

Has not this Advice thrown the Town into Confusion? And was it not done, to serve a Party? If it was Ignorance, it must have been *crassa Ignorantia*. It was Opposition to Government; and like the Case of *The Protector*, and *The Town of Kingston upon Thames*, in *Style 477*; where the Bailiffs adjourned the Court, and their Opponents stayed and acted, and made and entered Orders: And *Glyn* Chief Justice held it good Cause to disfranchise "for entering of Orders made by a pretended Court, " which in Truth was no Court."

And they cited the Case of *The King* against *Mayor &c. of Newcastle*: where the Court refused a peremptory Mandamus to restore *Matthew Featherstonhaugh*; as being *nugatory*, after he had totally deserted the Place, and resided in and near *London*. [This Case was determined on *Wednesday* the 11th of *November* 1747.]

Mr. Serjeant *Davy*, *contra*, for the Recorder.

Lord MANSFIELD told Him, He had no Need to give himself any Trouble.

HIS LORDSHIP then expressed Himself to the following Effect.

Whether the Serjeant will *continue* Recorder of the Corporation, if restored; after all this that has passed, is for *his* Consideration: The Question before *Us*, is “Whether He was “*properly amoved*; and whether He ought to be restored to his “Office.”

There is a Consent of all the Parties, to be determined by *our* Opinion on this Motion.

The two general Articles charged upon Him are His Behaviour at the Election; and his Non-Attendance at the *April*-Sessions. (For the Want of Attendance at the *January*-Sessions is candidly given up.)

The Charge of Misbehaviour at the Election is, shortly, his Administering the Oath both to *Keate* and the Mayor; though the Mayor commanded Him to administer it only to Himself. That the Mayor having adjourned the Poll, the Serjeant declared his Opinion, “that the Mayor could not adjourn without the “Consent of the Candidates;” and that He continued with *Keate*, taking the Poll at the former Place.

I choose to take it in the Order in which the Corporation make the Charge: And They begin with his Conduct at the Election.

I dare say, That was the *principal* Ground of their amoving Him.

There is no Charge at all, of any *corrupt Motive* for his giving this Advice, or doubting of the Legality of the Mayor's presiding. And it is plain, that it was a *sincere* Opinion; becaule the Candidate whom He espoused, risqued the Fate of his Election upon it; and Those who voted for that Candidate, did not vote before the Mayor and *Keate* both, but only polled before *Keate*. Therefore, how erroneous soever his Advice might be, it was plainly his *real* Opinion.

He had Nothing to do at *that* Meeting as Recorder; nor was this a *Corporate Meeting*. It was a Burrough by Prescription. The Mayor has the Return: He might have made it without the Recorder.

But, as Recorder, He is a *Justice of Peace*.

Has He then misbehaved as a Justice of Peace?

Two Persons claim the Return : And Both demand to have the Oath administered. He administered it to Both : *Valeat quantum valere potest*. This, surely, was no Breach of Duty of his Office.

The *Mayor* adjourns the Poll. The Serjeant had nothing to do with the Adjournment, but as a *Voter*. He gives His Opinion. His Opinion was wrong. They who were his Friends, suffer by it. This is no Breach of his Corporate Duty.

As to his absenting Himself from the *April* Sessions—All the Charge is, “That He was *not present* at it.” He says, that whilst He was resident there, He did attend : And since his residing in *London*. He has generally attended about once a Year. That in *April*, two Justices were upon the Spot. That *no* * *particular Notice* was given Him, to induce Him to go down : And that little or no Business occurred when He has attended. And there is no Charge that there was any Business *then* to come before Them.

• V. ante,
Vol. 1.
P. 532.

I know of no Case that says that the bare being *once* absent is a Forfeiture. And in this very Case, the Counsel for the Corporation allow an Excuse for his Absence in *January*. So that Absence *may* be excusable.

Indeed, a *general* Neglect, or Refusal to attend the Duty of such an Office, is a Reason of Forfeiture ; a *determined* Neglect, a *wilful* Refusal. But a *single Instance* of omitting to attend, when no particular Business was expected, nor in Fact happened, is a very different Case.

I think the Law is well laid down by Serjeant *Hawkins* in treating of Offences by Officers, by Neglect or Breach of Duty. He says, “It is certain that an Officer is liable to a Forfeiture of his Office, not only for doing a Thing directly contrary to the Design of it ; but also for *neglecting* to attend his Duty at all usual proper and convenient Times and Places, whereby any Damage shall accrue to Those by or for whom He was made an Officer. And some have gone so far as to hold, That an Office concerning the Administration of Justice or the Common Wealth, shall be forfeited for a *bare Non-User*, whether any special Damage be occasioned thereby or not. But this Opinion doth not appear to be warranted by any Resolution in Point ; and the Authorities which are cited to maintain it, do not seem to come up to it †.”

† See Hawkins's P. C.
Vol. 1. c. 66.
§ 1. p. 167,
168.

He refers to several Books and Cases in his Margin; and agrees with those Authorities that say "That He who so far neglects a public Office, as plainly to appear to take *no Manner of Care* of it, should rather be immediately displaced, than the Public be in Danger of suffering that Damage, which can not but be expected some Time or other from his Negligence."

But No-Body can say or even imagine, that *One single Absence* from a Session, at which Nothing of Importance was likely to happen, can amount to *such* a Neglect of a Recorder's Office, as to make Him plainly to appear to take *no Manner* of Care of it.

It is perfectly consistent with the Case of Serjeant *Whitaker*, as reported by Lord *Raymond**, to say "That the *bare being* * 2 Lord Raym. 1237. absent, is not a Cause of Forfeiture." That Case was an Amotion of Serjeant *Whitaker* from his Recordership of *Ipswich* for Non-Attendance (amongst other Causes of Amotion) at two distinct Sessions of the Peace, Both appointed by Himself, and at a Time too when He was (as it appears) present within the Burrough. The Corporation there state (not a *single Absence*, but *two* different Neglects, at *two* distinct Sessions,) "that He and another Justice appointed a Session to be holden on the 14th of *January* 1702, and issued a Precept to return a Grand Jury &c; and that the Session was proclaimed accordingly; and that He had Notice of all the Premises; and All were ready; and that He, *licet solemniter exactus, voluntarily* and *without any reasonable Cause* absented Himself." And They state *another like Default* on the 1st of *April* following; only *mutatis mutandis*.

Then they state, in *hæc Verba*, the Notice they gave Him to appear and answer why He did not attend and assist: "You knowing that by the Charters of this Town, no Sessions of the Peace could be holden for this Town, *without the actual Presence* of the Bailiffs and Recorder thereof."

Then when He attends, all the Reason He gives is "That He *expected to have been sent for*, when They were ready." Plainly, therefore, He was *in the Town*: And 'tis as plain that He *wisely* and *voluntarily neglected* to attend.

The Exceptions there taken to the Cause of Forfeiture so assigned in not attending to hold a Session of the Peace, were *only two*: 1st, "That a Session of the Peace might be holden *without Him*, He not appearing to be of the *Quorum*; and two Justices

“ces of the Peace may hold a Session of the Peace. 2dly. Ad-
 “mitting it could not, yet 1st. They ought to have *sent for* Him;
 “and 2dly. They ought to have shewn some *special Damage* to
 “the Corporation by the not holding the Sessions.”

’Tis to THESE *two Exceptions only*, that the Opinion of the Court is applied: And therefore it must be understood as qualified and restrained to the Subject then in Debate before Them. The Question was not “*how many* Non-Attendances of a *Non-resident* Recorder should amount to a Forfeiture;” but “whether his *wilful* absenting Himself *when in the Town*, was so.”

It is not argued “whether His Presence was *necessary* to the Holding of the Session;” (though it appears upon the Return that it was.) But it was urged on the Part of Serjeant *Whitaker*, “that admitting it to be so, yet they ought to have sent for Him; and also they ought to have shewn some special Damage to the Corporation, by the not holding the Sessions.”

The Corporation say, “That no particular Notice was necessary;” and “that He ought to have attended this Session of his own Appointment, being *in the Town*.”

The Opinion of the Court is, “That, *admitting* the Presence of the Recorder was *not necessary*, by the Charter, to the Holding a Sessions of the Peace, yet He *must attend*; For it was the Intent of the Charter in making such an Officer, that He should assist the Corporation in Matters of Law: And the Justices of Peace, though They had Power, yet They might be afraid to proceed to the Holding of a Sessions without their Recorder. And secondly, this Office being a *public Office concerning the Administration of Justice*, the Officer is bound to attend at his Peril: And *Non-Attendance* is a Cause of *Forfeiture* of his Office, though no Inconvenience ensue by his Non-Attendance. And the Difference is between *public* and *private* offices. And so is *Co. Litt. 233. a. 9 Co. 50*. Though, as the Chief Justice said, in this Case the Corporation might be disfranchised for neglecting to hold Sessions of the Peace; and so his Non-Attendance *was* a Damage to them.”

There is no Doubt that Non-Attendance is a Cause of Forfeiture: But the Question is, “*what SORT* of Non-Attendance.”

The Question in that Case of *Ipswich* was not “*what Sort* of Non-Attendance.” Serjeant *Whitaker* appointed the Session, Himself; was actually then *upon the Spot*; and *voluntarily and wilfully* absented Himself.

A mere

A *mere* being absent *once* from attending a Session, without any particular Circumstance, is no Cause of Forfeiture.

In the Case now before Us, the Recorder *resided in London*, and had *no particular Notice* to come down to hold it. The Corporation have been satisfied with his *former Absence*: And He had *no particular Reason* to attend at this particular Time; And there was a sufficient *Quorum* upon the Spot. Therefore this was not a *crassa Negligentia*, sufficient to forfeit his Office.

I am warranted in the Opinion I have given, by the Case in 2 Roll. Abr. 155. Letter N. pl. 2. 3. "A negligent Escape is no Cause of Forfeiture of the Office of Marshal: But if He suffers *several* such Escapes, it lies in the Discretion of the Court, to oust Him."

As in that Case of the Office of Marshal, *One* Instance is not enough to amount to a Forfeiture of the Office; so here, a *single* Instance, under the Circumstances appearing upon the present Return, ought not, in Point of Law or Common Sense, to render this Officer of the Corporation liable to the Forfeiture of his Franchise.

Therefore I think the Mandamus ought to go.

Mr. Justice YATES was absent.

Mr. Justice ASTON and HEWITT were of the same Opinion with Lord MANSFIELD; and spoke to the same effect.

The Former said, He would only observe that here was (as it appeared to Him) no Cause of Amotion *pro malâ gestura*, if it were granted that the Serjeant *had* acted as Recorder, at the Election: For, it was not a *criminally*-erroneous Opinion that He gave, if it should be admitted to be erroneous.

And with regard the Non-Attendance—The Charge was allowed to be sufficiently answered, as to the *January*-Session. And as to the *April*-Sessions—He saw no Cause of Amotion disclosed in these Affidavits; even upon the Rule laid down in 9 Co. 50. For, this is not *such* a Non-User or Non-Attendance as falls within that Rule: This is only *One single* Instance, unattended with any One aggravating Circumstance. And he mentioned a Case in 2 Salkeld 467. pl. 5. where the Court refused to grant a Rule against the Clerk of a County-Court for granting a Replevin without taking Surety of the Plaintiff to prosecute;

cute; as it was a *single* Instance. They said, that when it grew into Practice, they would interpose: As if a Sheriff constantly or *frequently* used to let Persons at large without Bail, *then* it is an abuse of his Office.

Per Cur'. unanimously—

RULE made ABSOLUTE.

Tuesday 27th
January 1767.

Rex versus Mayor, Bailiffs and Burgesſes of Cambridge.

ON *Thursday* the 27th of *November* laſt, Mr. *Wedderburn* ſhewed Cause againſt a Mandamus to be directed to the Corporation of *Cambridge*, commanding them to proceed to the Election of a Mayor, under the Statute of 11 G. 1. c. 4. § 2.

The Caſe was, That They had *in Faſt* choſen One upon the 16th of *Auguſt*, which was the Charter-Day; namely, Mr. *James Gifford*, Junior, who was an *Officer in the Army*, juſt gone to *North America*, and *without* the leaſt Probability of *returning* till long after the Year would be expired.

The Electors were ſufficiently apprized of the Faſt, at the Time of Election; and ſoon after it, had expreſs Notice given Them of it: But they reſuſed to go to a new Election.

The Day appointed by the Charter for ſwearing the Mayor in, is the 29th of *September* yearly.

The RULE was then enlarged by Conſent, on the Corporation's agreeing to be bound by the Opinion of the Court (if againſt them) without making any Return to the Mandamus. It was alſo conſented to, that further Affidavits might be filed on both ſides, within limited Times; within which limited Times, each Side ſhould be reſpectively at Liberty to file them. And each Side was to have Inſpection of the Books of the Corporation.

Mr. *Thurlow*, Mr. *Aſburſt* and Mr. *Wedderburn* now ſhewed Cause againſt the Mandamus.

They inſiſted that the Office was *full*: And that the Court would not interpoſe and diſplace an Officer, without his having any Notice.

They argued, that the Statute of 11 G. 1. c. 4. is out of the Caſe: Becauſe here *has been* an Election: Whereas that Statute

can take Place in those Cases only, where there has been *no* Election made upon the Charter or Usage Day. It is neither impossible nor improbable that the Person elected may return within the Year: And He may be sworn at any Time. He has an Estate, a Freehold, in the Office; and has Himself a Right to a Mandamus to be sworn. Therefore the Court will not send a Mandamus to go to a new Election of another Person into his Office, without *bearing* Him.

By the Charter of 36 C. 2. and by Prescription also, the old Mayor is to *hold over*, till Another shall be chosen and sworn in: And that has been the Usage, Time immemorial. So that the Corporation is in no Danger of Dissolution. And though the Charter says "That the Mayor shall be sworn in upon a particular Day;" yet that is only directory: He may still be sworn, though the 29th of *September* be past.

Sir *Fletcher Norton*, Mr. *Dunning*, and Mr. *Yorke*, argued on the other Side, for the Mandamus.

We apply upon the Facts, UNDER *the Act of 11 G. 1. c. 4.* for a Mandamus to go to an Election, upon the Foot of there having been no *due* Election. The Words "*No Election*," in that Act, mean no *due* Election. The Case of *The Borough of Bossiny alias *Tintagel in Cornwall*, 2 Str. 1003. settles this Point. • V. ante, p. 1453, 1454.

The Election here pretended is *merely colourable*. The Electors *knew* that He was just gone to *North America*; and that there was no Chance of his returning within the Year. So that the Election was merely *elusory*, and calculated to enable the old Mayor to hold over: Which was the very Thing that the Statute of 9 Ann. c. 20. meant to prevent. And the 11 G. 1. must be coupled with that of *Queen Anne*.

They cited the Case of *Rex versus † Mayor of Carmarthen, P.* † The Name of the Case was—*Rex v. Newsham and Others, Common Council-Men of Carmarthen.* 1755, 28 G. 2. which was a Mandamus granted, after an Election *de Facto*.

Lord Chief Justice Ryder delivered the Resolution of the Court, upon Monday 12th May 1755: Which was, "that a mere *de facto* Election, which appears to be *without Right*, "is not sufficient:" For, the Act means, "where no *due, legal, valid* Election has been made."

Suppose They had chosen a Person clearly incapacitated; would not the Court have issued a Mandamus? Now the Incapacity of this Gentleman is *total*, for the Time; though only temporary in Respect of its Continuance. And if the Disability be total, the Court will grant a Mandamus to go to a new Election.

tion. So they will, if they have good Reason to think the former Election void. 2 Str. 1157. *Rex versus Burrough of Aberystwith.*

* V. ante,
Page 1453.

In Mr. * *Scawen's Case*, Port-Reeve of St. Michel, Mich. 1753. 27 G. 2. the Court granted a Mandamus after a former Election.

Mr. *Gifford* indeed is not before the Court: Nor can He be so; because He is in *North America*. But his Election was void: It was no Election at all.

They have not cited any Case on the other Side, to prove that the Court can not grant a Mandamus, where the Office was full.

† Mr. Justice
Yates was not
in Court.

THE COURT † were very clear, that a Mandamus ought to go.

LORD MANSFIELD said He had no Doubt on this Question.

The Acts of 9 Ann. c. 20. and 11 G. 1. c. 4. were made to obviate the Misbehaviour of Mayors.

The Corporation has a Right to a new annual Officer, every Year: And He ought to be *duly* chosen. The Court are to judge whether such an Officer be *duly chosen*, or not.

‡ V. ante, p.
1454. accord.
in Rex v.
Bankes, Esq.
et al.

If an Officer is actually sworn in, They may perhaps think it proper that his Right should be tried first; or if the Election be doubtful or questionable: But if They see ‡ clear, that there is only a colourable Election, it is void; He has *no estate* in the Office; and the Court will not keep the Corporation without a Head, but will grant a Mandamus to go to Election.

Sir *Fletcher Norton's* two Cases of *Carmarthen* and *St. Michel* are very strong, if the present Case wanted Authorities.

The Ground of the present Application is, that here has been *no* Election.

This pretended Election is a mere Colour, to avoid any Election at all.

The Electors knew the Circumstances of this Person: They were apprized of the Whole, before the Election was concluded. They chose Him, because it was impossible for Him to execute

the

the Office. This is *no* Election at all: It is a mere Colour, a playing upon Words. "*An Election*" means a *due* Election. They were morally certain that He could not execute the Office, to which they chose Him.

Whether the last Mayor has a Right to hold over, seems a very doubtful Matter: It depends upon a surrendered Charter, never acted under since. So that this would involve the Corporation in fresh Difficulties.

The Corporation have a Right to an Officer: And the Court ought to grant this Mandamus.

The Person now pretended to be elected is incapable; and chosen because He was so: Nor can He be obliged to accept the Office, and act. It is a void Election. And as They knew of the Incapacity, their Votes were as no Votes: They were thrown away.

Mr. Justice YATES was absent.

Mr. Justice ASTON and Mr. Justice HEWITT were clearly of the same Opinion with Lord MANSFIELD, That a *mere de facto Election* is not sufficient to prevent the Court from issuing a Mandamus under the 11 G. 1. c. 4. which clearly means that "where no *due legal valid* Election has been made upon the "Charter or Usage Day," the Court may issue a Mandamus. And they were equally clear, that *this* was a mere *colourable* Election, an Elusion of the Act; a *void* Election, and as *no* Election at all; and consequently, that the Office was not full; nor had this Person any Estate in it: The Whole is a mere Contrivance to evade the Act, and to frustrate the Intention of both 11 G. 1. and the 9th of Queen Anne.

Therefore—*Per Cur'*. unanimously—

RULE made ABSOLUTE.

It was ordered to be directed "to the *late* Mayor" (without specifying his Name.)

Rex *versus* The Inhabitants of Shalfleet:
Sherrington's Cafe.

Saturday 31st
January 1767.

ON Wednesday 19th November last, Mr. Dunning moved to quash an Order of Sessions, which quashed a Rate assessing John Sherrington to the Poor; and had a Rule to shew Cause.

The

The Question was, "Whether an Officer of the *Salt-Office* is liable to be rated to the *Poor*, in Respect of his *Salary*."

The following Special Case was stated, upon the Officer's appealing from the Rate—

J. S., the Appellant inhabits a Tenement in *Shalfleet*: And He is an Officer appointed by His Majesty's Commissioners of the Salt-Office, for the Purpose of superintending the Salt-Works carried on in the Parish aforesaid; for which He receives a Salary of 40 *l. per Annum*, by Monthly Payments, from the Government; and is removable from his said Office by the Commissioners at Pleasure. That the Salt-Works which He superintends have been and are assessed, both to the Land-Tax and to the Poor; and have constantly paid such Assessments. That the Officers appointed by the said Commissioners for the Purposes of superintending the Salt-Works have been assessed to and have paid the *Land-Tax*: But it does not appear to this Court [the Court of Sessions] that such Officers have been before this Time rated to the *Poor*. That the said *J. S.* is rated to the Poor, the Sum of 3 *l.* 18 *s.* upon the Account of his said *Salary only*. The Sessions, being of Opinion "That the said *John Sherrington* is not rateable for his Salary," doth *quash* the Rate: And it is, by their Order, quashed accordingly.

This Order of Sessions imports to have been made on the *Appeal* of the said *J. S.* an Inhabitant of *Shalfleet* in the *Isle of Wight* in the County of *Southampton*, Salt-Officer, from and against a Rate made for the Relief of the Poor of the said Parish, and confirmed by two Justices.

On *Wednesday* last (the 28th) Mr. Attorney-General (*De Grey*) and Mr. *Thurlow* shewed Cause, on Behalf of the Salt-Officer, why the Order of Sessions should not be quashed.

They chiefly insisted upon it's being a Tax charged upon the Profits of the Man's daily Labour; and relied on the Construction of the Act of 43 *Eliz. c. 2. § 1.* This Charge is, by the Words of the Order, "upon the Account of his *Salary only*."

Assessments for the Relief of the Poor must be made according to the Person's *visible Ability within* the Town or Place where He inhabits; and without having Regard to any other Estate which He has in any other Town or Place.

In 2 *Bulstr.* 354. it was so holden by *Hutton* and *Croke*: And They declared it to be the Opinion of All the Judges of *England*,

land, on a Reference made to them, and upon a Conference together.

The *Land-Tax* Acts indeed expressly mention Offices and Salaries: Which distinguishes that Rate from this for the Relief of the *Poor*.

Quit-Rents and the Casual Profits of Manors are taxable to the *Land-Tax*; though not to the *Poor*. *Rex* versus *Vandewall**: And the Reason there given is, because they never were rated before. They cited the Case of *Chelsea-Hospital*†, where the Usage was not to tax.

* V. ante, p. 991.
† V. ante, p. 1059 and 1064. S. C. cited.

So here, the *Usage* has been, not to rate the Salt-Officers to the *Poor*, though they are rated to the *Land-Tax*.

A Man is rateable for no other personal Property than what He has *in* the Parish.

Sir *Fletcher Norton* and Mr. *Dunning*, *contra*—were for quashing the Order of Sessions‡

They argued that He was rateable for his *Salary*, within the Words, as well as Meaning and Intention of the Statute of 43 *Eliz. c. 2*: Which, they said, had been always construed with Favour and Latitude, and extended very often far beyond the Words.

It is reasonable, that where Persons derive a Benefit from, They should submit to the Burthens of the Parish.

As to Usage—The Apartments in *Chelsea-College* did not use to be rated to the Relief of the *Poor*: Yet they have been adjudged to be rateable. So that that Case is *for* Us; having been determined *contrary* to the former Usage.

Every Man is, for every Sort of personal Property which has a certain Produce, rateable to the Relief of the *Poor*, in the Parish where He *lives*; not in the Parish where his personal Property *lies*. And this is a fixed, certain, permanent Produce, as to the *Value*: It is no otherwise casual or contingent, than in Respect of the Man's Continuance in his Office. If He ceases to be in Office, He will cease to be taxed.

These Salaries have been thought to be fit Objects of Taxation to the *Land-Tax*: And there is much stronger Reason why they should be so to the *Poor*. They are expressly named in the *Land-Tax* Acts: Which shews that they are fit Objects of Taxation in general.

* V. ante,
p. 993.

In *Vandewall's Case*, the *Resolution of the Court, was not grounded upon *Usage* only.

† V. ante,
p. 1053.

In the Case of *St. Luke's Hospital* †, No rateable Object was to be found.

‡ V. ante,
p. 1341.

As to 2 *Bulfr.* 354.—The Counsel on the other Side apply the Words “Visible Estate he hath in the Town,” to the *Thing*: But they ought to be applied to the *Person*. And We say, that every Man is rateable, in the Parish where He lives, for all his visible Property, *wherever* it lies. Indeed an uncertain Fund is not rateable: As was resolved in the Case of the Occupiers of Lead-Mines in *Cumberland* ‡.

No Objection has been made to the *Quantum* of this Rate: The Objection is, “That the Officer is not rateable.” If an Officer's Salary should be extremely small, He ought not indeed, in Point of *Discretion*, to be rated: On the contrary, if it be a handsome Salary, He ought. But the present Question does not turn upon the *Quantum*, but upon the being rateable, or not being rateable, in Respect of Salary: Which is personal Estate within the Parish.

Lord MANSFIELD desired to think of it, for a Day or two; and to look into the Acts. It is very extensive; and a new Thought.

CUR'. advisare vult.

HIS LORDSHIP now delivered the Opinion of the Court; having first stated the Case.

He said He had no Doubt, upon the Argument: But as it was a Point of general Extent, He took Time to consider it.

This Man is rated for his *Salary only*; for a specific Property bringing Him in a Monthly Sum of Money, for executing an Office determinable at Pleasure.

This Species of Property is not mentioned in the Act of 43 *Eliz*: Nor has it any Analogy to those Sorts of Property that are mentioned therein.

The whole Scope of the Argument against the Order of Sessions was foreign to the Question. It was, “that a Man *may* be rated in his Parish for his *personal Estate*.”

¶ On 9th Feb.
1769, *Rex v.*

Guardians of the Poor of the City of Canterbury: S P. was discussed, but not determined.

A Man's

A Man's personal Estate is only what He is worth after Payment of all his Debts : Which can not easily appear, so as to be rated. But *that* is not the Question here. He is here rated for this *specific* Property, as *lying in the Parish* : Which He ought not to have been.

WE are ALL of Opinion, " that this is not *such* a Species of " Property as can be rated to the Relief of the Poor, as personal Estate within the Parish."

Therefore let the Order of Sessions be affirmed.

ORDER OF SESSIONS AFFIRMED.

Rex *versus* Inhabitants of St. Matthew's Bethnal Green. Tuesday 3d
Feb. 1767.

See this *Case* in the Quarto-Edition of my SETTLEMENT-CASES,
N^o. 185. p. 574.

Heathfield *versus* Chilton.

Thursday 5th
Feb. 1767.

ON shewing Cause why the Defendant should not be discharged out of the Custody of the Marshal, (upon 7 *Ann. c. 12.*) as a domestic Servant to Paul Pierre Russell, MINISTER* * V. the next Page.
from the Prince Bishop of *Liege*—He swore Himself to be *bonâ fide* Eng^lish Secretary to Him; and to have been *bonâ fide* hired by Him, as such; and to have *bonâ fide* received Wages, as they became due, at the Rate of 30*l. per Annum*. Both the Minister Himself, and the Relation of this Man to Him, were objected to.

But *Chilton's* own Affidavit was positive, as to the Service; and that it was real and not colourable : And it was confirmed by a Mr. *Chamberlayne*, who called Himself Secretary. He also swore that He was not an Object of the Bankrupt-Laws. He had been House-Steward to Lord *Northington*. No Certificate was produced, under the Hand and Seal of the Minister; though the *Application* was made (as the Attorney alledged) on the Part of the *Minister* : Nor was it sufficiently sworn, that the Defendant was in the Service of the Minister, at the TIME when he was arrested.

Lord

* V. ante,
Triquet et al.
v. Bath, Vol.
3. p. 1478.

LORD MANSFIELD—The Privileges of public Ministers and their Retinue depend upon the Law of *Nations*; which is *Part* of the Common Law of *England*. And the Act of Parliament of 7 *Ann* c. 12. did not *intend* to alter, nor *can* alter the Law of *Nations*. His Lordship recited the History* of that Act; and the Occasion of it; and referred to the Annals of that Time. He said, there is not One of the Provisions in that Act, which is not warranted by the Law of *Nations*.

The Law of *Nations* will be carried as far in *England*, as any where; because the Crown can do no particular Favours, affecting the Rights of Suitors, in Compliment to public Ministers, or to satisfy their Points of Honour.

The Law of *Nations*, though it be liberal, yet does not give Protections to screen Persons who are not *bonâ fide* Servants to public Ministers, but only make Use of that Pretence, in Order to prevent their being liable to pay their just Debts.

† See Mr. Forster's Cases in Equity, Temp. Ld. Talbot, p. 281. and ante, p. 1480. 1481. from Lord Mansfield's own Note of it.

The Law of *Nations* does not take in Consuls, or Agents of Commerce; though *received as such*, by the Courts to which They are employed. This was determined in *Barbuit's Case*† in *Canc'*. which was solemnly argued before and determined by Lord Talbot, on considering and well-weighting *Barbeyrac*, *Binkershoek*, *Grotius*, *Wincquesfort*, and all the foreign Authorities: For there is little said by our own Writers, on this Subject. In that Case several curious Questions were debated.

If I did not think there was enough in the present Case, already appearing to the Court, to enable Us to form an Opinion, I should desire to know in what Manner this Minister was *accredited*. Certainly, He is not an *Ambassador*; which is the first Rank. *Envoy*, indeed, is a second Clais: But He is not shewn to be even an Envoy. He is called "*Minister*," 'tis true: But *Minister* (alone) is an equivocal Term.

I find this is not an Application by the *Attorney-General*, by the Direction and at the Expence of the Crown. That, indeed, would have shewn that the Crown thought this Person intitled to the Character of a public Minister. It now remains uncertain what his proper Character is.

But *supposing* Him to be a Minister of such a Kind as *intitles* Him to Privilege; yet I think this is *not* a Case of Privilege, by the *Law of Nations*: For, the Defendant does not appear to have been in the Service of the Minister, AT THE TIME of the Arrest.

A public Minister shall not *take* a Man from the Custody of the *Law*: Though the Process of the Law shall not take his menial Servant out of *his* Service.

Here, it is not sworn *when* the Defendant came *into* the Service. And upon the Manner of swearing here used, the Court *must take it*, "That He was *not* in the Minister's Service, at the *Time* of the Arrest."

N. B. There was what was called a supplemental affidavit: But it was holden

not to be *now* admissible; because it could not be answered.

Mr. Justice YATES was not in Court.

Mr. Justice ASTON concurred. The Rule laid down by Lord MANSFIELD is a very right One. The Process of the Law shall not, indeed, take a Person *out of* the Service of a public Minister: But, on the other Hand, a public Minister can not take a Person out of the Custody of the *Law*. If a Man has no such Privilege *at the Time* of his being arrested; no *subsequent* Privilege can be given him, by being *afterwards* taken into the Service of a public Minister.

Therefore, as it does not appear here, that the Defendant was *then* in the Service, he can not be intitled to this Privilege.

This is a true and right Principle: And the Establishing it may prevent many of these Applications.

Mr. Justice HEWITT concurred; and repeated and confirmed the Principle; and agreed that it does not here appear that the Defendant was, at the *Time* of the Arrest, in the Service of this Minister.

Lord MANSFIELD took Occasion to observe, that the Registering the Name of the Defendant in the Secretary of State's Office, and transmitting it to the Sheriff's Office, (mentioned in the fifth Section *,) relates only to the Bailiff who arrested Him; and is *no Condition precedent* to the being intitled to the Privilege of a public Minister's Servant. In *this*, Mr. Justice *Aston* also concurred.

* Sect. 5. provides "that no person shall be proceeded against as

" having arrested the Servant of an Ambassador or public Minister, by Virtue of this Act; unless the Name of such Servant be first registered &c."

Per CUR'. unanimously † —

† Mr J Yates was absent.

RULE DISCHARGED.

Friday 6th
Feb. 1767.

Frederick, Bart. *versus* Lookup, qui tam &c.

THERE had been a long gaming Squabble between Sir *Thomas Frederick* and Mr. *George Lookup*. Some Account of the former Part of it, where Sir *Thomas* made the attack upon *Lookup*, may be seen in the last Volume, from page 1901 to page 1904. Afterwards *Lookup* took his Turn, and attacked Sir *Thomas*, by an Action in the Common Pleas, in the Name of his Brother, as a Common Informer, brought against Sir *Thomas* upon the 9 *Ann. c. 14. sect. 2.* for the Sum of 3150*l.* being 787*l.* 10*s.* Money won at Play by Sir *Thomas* at One Sitting, and 2362*l.* 10*s.* the treble Value of it: One Moiety whereof is, by that Act of Parliament, given to the Person suing; and the other Moiety, to the Poor of the Parish where the Offence was committed.

This Action was brought in the Common Pleas, in *Michaelmas* Term 3 G. 3. by *Andrew Lookup*, the Defendant in Error, as a Common Informer, against Sir *Thomas Frederick*, described as being late of *Westminster* in the County of *Middlesex*.

The Record in C. B. begins thus—(Roll 305.) *Middlesex*—to wit—Sir *Thomas Frederick* late of *Westminster* in the said County Baronet was summoned to answer to *Andrew Lookup*, who sueth as well for Himself as for the Poor of the Parish of *St. Paul Covent-Garden* in the County of *Middlesex* aforesaid, in a Plea that He render to the Poor of the Parish aforesaid and to the said *Andrew* who sues as aforesaid, the Sum of 3150*l.* which He owes to them, and unjustly detains &c. And whereupon the said *Andrew*, who sueth as aforesaid, by S. B. his Attorney, faith that one *George Lookup*, after the 11th Day of *May* in the Year of our Lord 1711, to wit on the 11th Day of *March* in the Year of our Lord 1757, at *Westminster* aforesaid, by betting at Cards did lose to the said Sir *Thomas* at One and the same Time and Sitting, the Sum of 525*l.* and then and there paid the said Sum of 525*l.* so lost as aforesaid to Him the said Sir *Thomas* the Winner thereof.

* 5 Ann.
c. 14. § 2.

Then He shews that *George Lookup* did not prosecute with Effect, within the three Months: Whereby and by Force of the Statute* an Action accrued to Him, who sues as aforesaid, for the Poor of the said Parish and for Himself, for 2100*l.* Parcel of the said 3150*l.* that is to say, the aforesaid 525*l.* and treble the Value thereof.

Then

Then it goes on with a like Demand of 1050*l.* other Parcel of the said 3150*l.* being 262*l.* 10*s.* lost to Sir *Thomas* by one *James Hamilton*, and treble the Value thereof.

And alledges that Sir *Thomas* hath not paid the said 3150*l.* to the said *Andrew*, and to the Poor of the Parish aforesaid.

Plea—*Non debet* : And Issue joined thereon.

The Jury find that the said Sir *Thomas* doth owe to the Poor of the said Parish and to the said *Andrew* who as well &c, 945*l.* Parcel of the within mentioned Debt of 3150*l.* in Manner and Form as declared for in the second Count : And they assess his Damages by Reason of the said 945*l.* being detained from the said Poor and from Him, besides his Costs and Charges, to one Shilling ; and for his said Costs and Charges, to forty Shillings.

They further find that the said Sir *Thomas* doth not owe to the said Poor and to the said *Andrew* who as well &c, the Residue of the said 3150*l.*

JUDGMENT—It is considered, that the said *Andrew* who as well &c, and the said Poor of the Parish aforesaid, do recover against the said Sir *Thomas* the aforesaid Sum of 945*l.* which by the Jury aforesaid is above found to have been forfeited by Him the said Sir *Thomas*, by Force of the Statute aforesaid, Parcel of the said Sum of 3150*l.* And that the said *Andrew* who as well &c, have one Moiety thereof, to wit 472*l.* 10*s.* to his own proper Use ; and that the said Poor have the other Moiety thereof to their own proper Use, according to the Form of the Statute aforesaid.

It is also considered, that the said *Andrew* who as well &c, do recover against the said Sir *Thomas* his Damages aforesaid, to forty one shillings by the Jury aforesaid in form aforesaid assessed ; and also 55*l.* 19*s.* to the said *Andrew* who as well &c, at his Request, for his Costs and Charges aforesaid, by the Court here, for the Increase adjudged : Which Damages, in the Whole, amount to 58*l.*

And the said Sir *Thomas* in Mercy &c. And the said *Andrew* who as well &c, in Mercy, for the false Complaint against the aforesaid Sir *Thomas* for the Residue of the aforesaid 3150*l.* whereof the said Sir *Thomas* is above acquitted : And that the aforesaid Sir *Thomas* go thereof without Day &c.

The Errors assigned are—That in the Record and Proceedings, and also in giving Judgment, there is Error; in this, That the Declaration in the Record mentioned is not sufficient in Law to maintain the Action: And that it appears by the Record, that Judgment was given for the Plaintiff the said *Andrew* who as well &c; when it ought to have been given for the Defendant *Sir Thomas Frederick*.

Joinder in Error—

Several Objections were made by the Plaintiff in Error, to this Judgment.

1st. That it does not appear that the Parish of *St. Paul's Covent Garden* had any Sort of Right to this Money. It is not shewn nor alledged, that the Offence was committed in that Parish: It is laid to be "*at Westminster* afore said," without specifying any Parish at all.

2d. It is a *wrong Venue*: Which is fatal in a penal Action.

3d. The Poor have here Judgment to recover, ("the said *Andrew* and the said Poor;") whereas the Act directs that the *Informers* shall recover.

4th. The Judgment is for *Damages* to the Common Informer, and also *increased* Costs. Whereas a Common Informer can't have Damages for the *Detention* of the Debt. 1 *Ro. Abr.* 574. Letter *P. pl. 1* and *pl. 4.* express. And the Costs *de incremento* are connected with these Damages. And this is an *entire* Judgment; and must be either affirmed *in toto*, or reversed *in toto*: It is not like distinct Judgments.

It was answered—

1st. This is *after Verdict*. It must have been proved at the Trial, "that the Offence was committed in the Parish of *St. Paul's Covent Garden*:" For, the Jury have found "that Sir *Thomas doth owe* to the Poor of that Parish" *Sir Tho. Raym.* 487. *Hitchins* versus *Stevens* lays down the Rule "that where-
"soever it may be presumed that any Thing must of Necessity be
"given in Evidence, the Want of mentioning it in the Record
"will not vitiate it after a Verdict." And this Rule extends to Actions upon penal Statutes. *Hobart* 78. *St. John* against *St. John*: And *Cartbew* 304. *Alston et al.* versus *Buscough*. The Court will intend it: *V. 2 Ld. Raym.* 1214. *Tyson* versus *Paske*.
It

It is only a Title defectively set forth. There is Nothing upon the Record contrary to it. The *Venue* is laid in *Westminster aforesaid*; which, by Reference, appears to be in the *County of Middlesex*: And *St. Paul's Covent Garden* is known to be in *Westminster* in the *County of Middlesex*. Besides, If it were admitted to be wrong, it would be cured, they said, by the Statutes of *Jeofailes*. 3 *Lev.* 374. *Sedgwick*, *qui tam* &c, versus *Richardson*. *Bendish* 37. *Keilway* 207.

2d. By 24 G. 2. c. 18. § 3. Every *Venire facias* for the Trial of any Issue in any Action or Information upon any penal Statute in any Court of Record at *Westminster* &c, shall be awarded of the *Body* of the County where such Issue is triable. So that the Restriction of 4 & 5 *Ann.* c. 16. § 6. (which expressly provided "that that Act should not extend to Actions or Informations upon penal Statutes,") is now taken off; and that Act is now extended to Actions and Informations upon Penal Statutes. And the Action is clearly brought in the proper County. The Sheriff can return no other than the general Pannel. *French*, *qui tam*, versus *Wiltshire*, 2 *Stra.* 1085.

3d. It may be either Way. 2 *Hawkins's P. C.* pa. 266. *sect.* 20. is very full to this Point, and cites many Cases. It was not necessary to mention the Poor of the Parish, in the Declaration. It is not necessary to name even the King: There is a precedent in long * *Quinto* of *Edw.* 4. of a Declaration in the Name of the Informer only, without mentioning the King. And if the Poor need not be named, it can't be necessary to shew that the Offence was committed in the Parish. The Statute of 9 *Ann.* c. 14. § 2. impowers any Person to sue for and recover the Money; and then directs that a Moiety of it shall be "to the Use of the Poor of the Parish where the Offence shall be committed." Therefore the Declaration may be laid, either "to render to the Informer only;" or, "to render to the Informer and the Poor:" And, consequently, so may the Judgment be likewise.

4th. The Counsel for the Defendant in Error acknowledged that a Common Informer can't have Judgment for *Damages for the Detention* of the Debt; because the Debt itself don't arise till the Judgment: And the increased Costs will † follow the Damages. But they denied that this was an *entire* Judgment, and must be reversed *in toto*, if at all. On the contrary, they are *distinct* Judgments, ("It is considered &c:" "It is also considered.") So that *Part* may be affirmed; and the *other Part*, which is affected by this Objection, may be reversed. *Bellew* versus *Aylmer*. 1 *Stra.* 188. *Henriques* versus *The Dutch West India Company*. 2 *Stra.* 807.

* 17. b.
118. a.
† V. 2 *Stra.*
934. *Lampen*
v. *Hatch*.

* Mr. Justice Yates was not present. THE * COURT, being satisfied with the Answers given to the Objections, *affirmed the former Part* of the Judgment; and *reversed the latter*.

RULE—Upon hearing Counsel for both Parties, IT IS ORDERED, that so much of the Judgment as relates to the *Recovery of the Debt* in this Action, be affirmed; and that so much of the said Judgment as relates to the *Damages and Costs*, be reversed.

Rex *versus* Nathaniel Dawes:

† V. ante,

(One of the † *Winchelsea* Causes.)

† This Rule had been enlarged from last Term: And the like enlarged Rule had been made at the same Time, against Richard Wardroper, and also against Thomas Marten.

† ON shewing Cause why an Information in Nature of a *Quo Warranto* should not be granted against the Defendant *Dawes*, who had been *nineteen Years and an half* in quiet Possession; to shew by what Authority He claimed to be One of the Freemen of *Winchelsea*—The two Objections made to Him were *Non-Residence*, and *not paying Scot and bearing Lot*.

THE COURT unanimously concurred in Opinion, that it was contrary to the true Spirit and Meaning of the Statute of 9 Queen Anne, c. 20, “for rendering the Proceedings upon Writs of “Mandamus and Informations in Nature of a *Quo Warranto* “more speedy and effectual; and for the more easy trying and “determining the Rights of Offices and Franchises in Corporations and Boroughs,” to grant Informations almost of Course; as had been the Practice till of late Years. They held that the true Intent of the Legislature in making this Statute, was, that the Court should *exercise a sound Discretion* according to the *particular Circumstances* of the respective Cases on which Applications were made to them for granting such Informations: And that it was by no means meant, that they should be granted of *Course*.

The Act was made for the *Quieting* of Corporations, not for throwing them into Disorder and Confusion. The Legislature were far from intending to encourage Attacks upon Persons who had been long in quiet unmolested undisputed Possession of Corporate Rights; though They have not explicitly fixed the exact Line of Limitation. But as They have left the granting or refusing these Informations in the Discretion of the Court, to be guided by such particular Circumstances as shall be laid before Them

Them, it is very proper for the Court to draw such a Line, in Order to forward the Intention of the Legislature. If the Court should be thought to fix it either too extensive or too narrow, it will always be in the Power of the Legislature to alter it.

In this View, the Court have already drawn such a Line, and fixed upon twenty Years as a proper Limitation of *Quo Warranto* Informations; *beyond* which Limit of quiet undisturbed unmolested undisputed Possession of Corporate Franchises, They will not listen to any Application of this Kind, to disturb such quiet Possession: But the quiet Possession *alone*, for twenty Years, shall be a flat Answer to the Application; and the Court will refuse the Information, upon what Circumstances soever the Application may be grounded.

Yet still, notwithstanding this Limitation to twenty Years, a *great* Length of quiet Possession, though somewhat *short* of this fixed Limit of twenty Years, may and ought to be taken into Consideration by the Court, as *One of the Circumstances* which may deserve to have it's due Weight in guiding their Discretion. Many Opportunities of Defence, many Proofs of Facts tending to Defence, may be lost; many Circumstances may be forgotten or not capable of being made out, after a long undisputed quiet Possession; many Witnesses may be dead or not to be found, after setting up such a *stale* Prosecution, which might have been easily recollected proved or produced, if the Prosecution had been commenced within a recent and reasonable Time.

And They declared their Inclination to lay down and establish as many certain general Rules as They could, in Cases of this Sort; in order to settle the Peace of Corporations, and prevent Litigations so inconvenient to Corporators and Corporations.

* RULE DISCHARGED.

* But Note—This Case was taken up again, the next Morning; and was then adjourned over. The Rule was taken in these Words—“The Court will consider
“ whether the Rule made Yesterday, to discharge a Rule
“ *nisi*, for an Information against *Nathaniel Dawes*, shall
“ stand, or not.”

And on the following *Tuesday* (the 10th of *February*,) the following Rule was made.—Ordered that the sixth Day of next Term be given to *Nathaniel Dawes*, to shew Cause why an Information in Nature of a *Quo Warranto* should not be exhibited against him, to shew by what Authority
he

he claimeth to be one of the Freemen &c. (*ut supra* :) With Liberty for either Party to lay before this Court Affidavits with Regard to the Consequences to the Corporation, in Case of granting an Information. *Rex versus Tho. Marten.* The like Rule. *V. post. p.* 8th July 1767.

Saturday 7th
Feb. 1767.

Rex versus Richard Wardroper :

* *V. ante*, p.

(Another of the * *Winchelsea* Causes.)

† He was elected on 13th May 1760: The Affidavit was sworn on the 4th of Nov. 1766. The original Motion was made in Michaelmas Term 1766.
‡ See the last Case.

SIR *Fletcher Norton*, on Behalf of the Defendant, against whom Non-Residence was objected, but not sufficiently proved; and whose Possession did but little exceed † Six Years; argued very strongly against the Line of Limitation having been drawn by the Court, so extensively as to reach to ‡ Twenty Years: For, that it was extremely clear to Him, that the Statute of 9 Queen *Anne* intended to confine Applications for Informations in Nature of a *Quo Warranto* to a very RECENT Time of Prosecution. It obliges the Relator to proceed expeditiously, *after* it is out of the Hands of the Court: And can it be supposed (especially considering the general Scope of that Statute,) that it did not mean to confine the first Application to the Court, to a recent and short Time? The Legislature could not mean, that the Court should ever grant them upon *stale* Prosecutions; whatever the Circumstances might be. He laid it down, by Analogy from other Limitations of Actions, that confining the Prosecution to six, four, or two Years would be much more reasonable, than allowing any greater Number, much less twenty Years.

And He declared that this was his Sentiment at the Time when the Court established this Limitation of twenty Years; but did not think it decent at that Time, to express his Disapprobation of it.

But Lord MANSFIELD said, the COURT had *settled* this to be the Line; and No-body made any Objection to it at the Time when They declared it: Therefore, it was now too late to object to it.

The Counsel for the Prosecution denied that the Act of 9 *Ann. c. 20.* had any Sort of View to limiting the Time of commencing a Prosecution of an Information of this Kind: For which, They appealed to the Statute itself.

Lord MANSFIELD declared his Desire to establish *Certainty*, in Corporation-Causes.

He did not, in this Case, go upon Length of Time, but upon the *Facts sworn*; which amounted, as He thought, to a Proof of Residence. He expressly declared that He did not, in *this* Case, go upon the Length of Time, as a Bar: though Length of Time, even under Twenty Years, may in *some* Cases have it's due Weight as one Circumstance joined to others.

Mr. Justice ASTON declared the same.—This does not turn upon *that* Rule; but upon the Circumstances of the Case: It appears, upon the Whole, that He *was resident* at the Time when He was elected.

In the Case of *Rex versus Milbourne*, P. 6 G. 3.—He had enjoyed the Franchise *ten* Years. But that alone was not holden to be a sufficient Reason to refuse the Rule.

These People who swear for the Prosecutor, lay by, without recently prosecuting, though with a full Knowledge of the Fact: Which is a Reason against admitting their Complaint now first taken up, to be the Ground of our granting an Information. In the Case of *Rex versus Lewis**, Capital Burgesses and Alderman * V. ante, of *New Radnor*, the Court gave Costs against the Prosecutor; because he Himself knew the Complaint to be groundless. Vol. 2. p. 780.

Mr. Justice HEWITT held also that here was sufficient Satisfaction given to the Court, of this Man's Residence. And the Court may, without any Impropriety, take Notice of the Conduct of the Persons making the Affidavits upon which the Application is grounded.

He thought that the Statute of 9 *Ann. c. 20.* does, upon the Whole, shew a Legislative Intention to prevent Confusion in Corporations, and an Apprehension of Inconveniences attending stale Prosecutions; though the enacting Part does not indeed contain any explicit Limitation of Time for commencing the Prosecution.

Per CUR. unanimously—

RULE DISCHARGED.

Thursday 12
Feb. 1767.

Rex *versus* Edward Cator.

THE Defendant had been convicted upon 5 G. 1. c. 27. and 23 G. 2. c. 13. of enticing and seducing Artificers in the Manufactures of this Kingdom into foreign Service.

Both Acts are upon the same Subject. His Offence was within *both* Acts. The Artificer seduced was a Coach-Spring Maker.

Lord MANSFIELD—The latter Act seems to be a Repeal of the Former: It was made, to supply the Deficiencies of the former.

N. B. The Penalty, for the first Offence, was by the former, 100 *l.* and three Months Imprisonment: By the latter, 500 *l.* and twelve Months Imprisonment. For the second Offence, by the former, Fine at Discretion, and twelve Months Imprisonment in the County-Gaol: And by the latter, 1000 *l.* and two Years Imprisonment.

Vide Rex versus Medcalfe, 4th July 1750: Where the Defendant was convicted (by Confession) upon *One* single Information, of having solicited *four* different Artificers: And the Court held that they could inflict but *One* Punishment; it being but *One* Information. That was a Conviction on 5 G. 1. c. 27. Also *Rex versus Josiam Knight*, twice; first, on 28th May 1753; and again, on 2d July 1754: Both, on the same former Act of 5 G. 1. c. 27. In all these three Cases the Fine was 100 *l.*

Mr. Justice ASTON observed—That by the latter Act, there is *no* Discretion left in the Court: The Punishment directed in it, is *peremptory*. The former Act directs the Fine for the first Offence, to be in “any Sum *not exceeding* 100 *l.*”

The SENTENCE in the Case now before the Court, was—To pay a Fine of 500 *l.*; and to be imprisoned in the County-Gaol* of the County of *Middlesex* for twelve Calendar Months, and until the Fine be paid.

* V. 23 G. 2.
c. 13. § 1.

Pope et Ux'. *versus* Redfearne, Un'. &c.

A Rule had been made, upon the Application of the Defendant, who was an *Attorney*, for the Plaintiffs to shew Cause "Why the *Venue* should not be *changed* from the County of *York*, where it is now laid; and be laid in the County of *Middlesex*." And the Question was "Whether an *Attorney* has a Privilege of changing the *Venue* into *Middlesex*, where he is DEFENDANT in the Cause."

Here was an Affidavit, that this Defendant resided in *Yorkshire*.

Mr. *Wallace*, on Behalf of the Plaintiffs, now shewed Cause against the Rule. He cited and relied upon the Case of *Cooper versus Mills*, an *Attorney*, *M. 10 G. 2. C. B. Barnes's Notes, Vol. 1. p. 344.* Title "*Venue*:" Where that Court determined, "that an *Attorney* being DEFENDANT hath *no* such Privilege."

Mr. *Barnes*, *contra*, for the Defendant, (the *Attorney*), cited and relied upon the Case of *Wigley versus Morgan, Un'. &c.* in 2 *Strange* 1049. *Trin. 10 G. 2. 1736. B. R.* where the Question was "Whether in an Action against an *Attorney*, he had Privilege to change the *Venue* into *Middlesex*; as well as to lay it there, when he is *Plaintiff*:" And the Court held, "there was no Difference."

Mr. Justice ASTON observed, that in the printed Rules of * this Court, (published in 1740,) that Resolution in 2 *Str.* is inserted; and in the same Term, *Trin. 1736*: and it was looked upon as settled, at that Time. But the Case of *Bisse versus Harcourt, P. 2 W. & M.* (in 3 *Mod.* 280. and *Cartwright* 126.) denies any such Privilege, where he is *Defendant*: And it appears, from the Case cited out of *Barnes's Notes*, "that the Court of Common Pleas did determine so, likewise," in *Mich. 10 G. 2.*

* See this Collection (in Folio) of the Rules Orders and Notices in this Court, p. ult, Note (c.) "If a Barrister, Attorney or Officer of the

"Court, be *Plaintiff*, and the Action be laid in *Middlesex*; the Court will not change the *Venue*: And if any such Person be a DEFENDANT, and sued in any other County than in *Middlesex*; the Court will, on motion, ALTER the *Venue* to *Middlesex*. But where they sue or are sued in *auter droit*, as Executors &c, or jointly with other Persons, then they lose their Privilege."

I think, the Resolution in *Bisse versus Harcourt* is the most rational Determination: And the Court of Common Pleas follow it still.

There is no Necessity for an Attorney to go down into the Country to attend a Cause where He is Defendant.

Lord MANSFIELD—The Case of *Bisse* versus *Harcourt* is the most rational Determination: And the Court of Common Pleas follow it.

Mr. Justice HEWITT—They do so.

Per Cur'. unanimously—

RULE DISCHARGED.

Though this Question is now (it may be hoped) finally settled, yet it may perhaps amuse the Reader's Curiosity, to lay before Him some intermediate Cases upon the same Question, which I find amongst my own Notes, subsequent to that of *Bisse* and *Harcourt*, but prior to the present Case, and which gradually lead to it.

The first of them was in *Hil.* 1731, 5 G. 2. B. R. *Bishop* versus *Burgefs*: Where the *Venue* was changed to *Middlesex*, because the Defendant was an Attorney; though he lived in the Country, and never attended *Westminster-Hall*.

The next was an Action upon the Case, brought by *Wigley* versus *Morgan*, an Attorney; reported (very shortly) in *Strange* 1049: Of which I have a full Note. Mr. *Lacey* had moved, on the Behalf of the Defendant, to change the *Venue* from *Surrey* to *Middlesex*; and obtained a Rule to shew Cause, On shewing Cause, He argued for the Attorney, the Defendant: Mr. *Vaughan*, for the Plaintiff. Mr. *Lacey* (besides the Cases mentioned by Sir *John Strange*) cited the abovementioned Case of *Bishop* versus *Burgefs*; and also a Case in C. B. *Hil.* 5 G. 2. *Hickes* versus *Foot*: Where an Action brought against a Barrister was laid in *Cornwall*; and the *Venue* was changed into *Middlesex*, though the Barrister could not practise at the Common Pleas Bar. He likewise cited *Bokun's Institutio legalis* 263. to prove "that an Attorney may choose whether he will sue or be sued, out of *Middlesex*." He argued that the Reason why the Attorney has this Privilege arises from his being obliged to attend *Westminster-Hall*: And that Reason holds equally strong, where he is Defendant,

Defendant, as where he is Plaintiff. And though in *Brome's Case*, 1 Keble 277. and in that of *Thompson* versus Sir William Scroggs, in 2 Shower 176. and in that of *Seaman* versus *Ling*, in 2 Salk. 668. and in *Hickes* versus *Foot*, the Defendants were *Barristers*, yet *Attornies* are included within the *Reasons* of those Resolutions: And *Wilcocks's Case* (mentioned in the Case of *Seaman* versus *Ling*) was the Case of an Attorney; and is in Point. Mr. *Vaughan*, on the other Side (for the Plaintiff,) cited a Case of *Lacker* versus *Harcourt*, in P. 2 W. & M. "Case
" against the Defendant; laid in *Somersetshire*. Sir *Bartholomew Shower* Himself moved to change the *Venue*,
" upon Account of the Defendant's Privilege as an Attor-
" ney and Clerk in Court, and to have it laid in *Middle-*
" *sex*; and shewed several Rules wherein it had been
" done, (as for Mr. *Bathurst*;) and urged the Practice for
" it, and the Reason of that Practice, viz. their supposed
" constant Attendance on the Court here. But DENIED
" by Chief Justice *Holt*, et ceteros tacentes: For that
" they have no such Privilege." Lord *Hardwicke* (at that Time Chief Justice) happened to be absent. The Other three Judges made the Rule absolute, for changing the *Venue* from *Surrey* to *Middlesex*. Mr. Justice *Page* mentioned a Case of Mr. *Knight*, Clerk of the Assize for the *Norfolk* Circuit, who laid his Action in *Middlesex*, though the Cause of Action arose in *Kent*; and the *Venue* was changed, upon the common Affidavit: But, upon Mr. *Knight's* Motion, that Rule was set aside, and the *Venue* brought back again to *Middlesex*. (See 2 Salk. 670. *Knight* versus *Farnaby et al.* (S. C.) Now the Case of an Attorney is stronger than that of a Clerk of Assize: For an Attorney ought to attend at *Westminster-Hall* always; whereas the Clerk of Assize is only bound to attend there to return the *Posseas*. And there is no Doubt about Counsel's having such a Privilege. Yet an Attorney is more obliged to attend, than a Counsel. Mr. Justice *PROBYN* said, it was admitted, in all the Books,
" that a Barrister is within that Privilege; because *West-*
" *minster-Hall* is the principal Place of a Barrister's At-
" tendance. Now the Reason holds the same, for Attornies: And two of Mr. *Lacey's* Cases support this; viz. *Bishop* versus *Burgefs*, and *Seaman* versus *Ling*, in 2 Salk. 668. And the Reason of the Thing is the same, where the Attorney is *Defendant*, as where he is Plaintiff. Mr. Justice *LEE* said He found no Difference between the Privilege of a Barrister, and the Privilege of an Attorney, as to this Matter, where they are Plaintiffs: Nor did he find any Determination to the Contrary, where

they are DEFENDANTS, excepting that Case of *Lacker* versus *Harcourt*, in 1 *Shower* 148. and the *same* Case in *Cartbew* 126. But the Cases have *since* been determined otherwise; particularly, that mentioned in 2 *Salk.* 668. and that of *Bishop* versus *Burgefs*. And it appears, from 2 *Ventris* 47. (in the Common Pleas,) “that where an Attorney is Plaintiff, he has Privilege to lay his Venue in *Middlesex*, because of his Attendance there.” And in the Case of *Knight* versus *Farnaby et al.* 2 *Salk.* 670. the Rule is laid down, “that Barristers &c who are to attend at *Westminster*, have therefore the Liberty of laying their Actions in *Middlesex*, when Plaintiffs.” [I find, amongst my own MSS, two Cases to this Effect. One, in H. 5 G. 1. B. R. *Collins* versus *Altham*—“The Venue shall not be changed from *Middlesex*, where a Counsel or an Attorney is Plaintiff:” The other, in P. 8 G. 1. 1722. B. R. *Forrest* versus *Chaworth*. “The Court refused to change the Venue from *Middlesex*, upon the common Affidavit; because, the Plaintiff being an Attorney, was obliged to attend the Court there.”]

Note—That although the Case of *Lacker* versus *Harcourt*, reported in 1 *Shower* 148. is supposed by Mr. Justice *Lee* to be the *same* Case with *Bisse* versus *Harcourt*, reported in *Cartbew* 126. yet it does not appear with absolute Certainty, “that, it is the *same*.” It is true, that they are Both reported as of the *same* Term: And the State of each Case is like the Other. Nevertheless, there are some small Differences. Sir *Bartholmew Shower* says, He shewed several Rules where it had been done; and specifies Mr. *Bathurst*’s Case: But it was denied, he says, by Chief Justice *Holt*, et ceteros tacentes. Whereas *Cartbew* mentions *Andrew Loder*’s Case, as that in which the Rule was produced, and to whom the Privilege was allowed: And according to his Report, the Rest of the Court were not silent; for he rehearſes a Case which Mr. Justice *Dolben* cited. Indeed Both agree that the Court denied the Motion, because *Harcourt* was the DEFENDANT: And Both agree “that an Attorney, or Officer of the Court, where he is DEFENDANT, hath no Privilege concerning the Venue.” Upon the Whole, I conjecture “that they were different Actions, but the *same* Question:” Which I collect from *Cartbew*’s speaking of the Actions in the plural Number:—“Because *Harcourt* was the Defendant in those Actions.”

The

The next Case, in Point of Time, to *Wigley* versus *Morgan*, was *Holliday* versus *Burgefs*, P. 1739, 12 G. 2. B. R. It was an Action on the Case upon a Promissory Note, brought against an Attorney. Mr. *Yorke* moved on his Behalf, to change the *Venue* from *London* to *Middlesex*. LEE (now become Chief Justice) mentioned the two abovementioned Cases of *Bishop* versus *Burgefs*, and *Wigley* versus *Morgan*; and said, that though there had been a Difference of Opinion, it was then settled, "that where " the Defendant is an Attorney, the Venue may, at his " Desire, be changed into *Middlesex*." Page, Probyn, and Chapple Justices, agreed with the Chief: And they said, it had been holden "that where an Attorney, being " Plaintiff, lays his Action in *Middlesex*, the Venue shall " not be changed." Lord Chief Justice LEE concluded with saying—"Take a Rule: They may move to set it " aside if they will."

The next Case to this last was *Wilson* versus *Evans*, Un'. &c. Hil. 1759, 32 G. 2. B. R. Mr. Price had obtained a Rule to shew Cause why the Venue should not be changed from *Yorkshire* to *Middlesex*; the Defendant being an Attorney, and sued as Such. Mr. *Luke Robinson* shewed Cause: And denied that an Attorney, being Defendant, had such Privilege. Mr. Justice DENISON said, there were Determinations both Ways. Lord MANSFIELD doubted whether the DEFENDANT, though he was an Attorney, had any Right to bring back the Venue into *Middlesex*, when the Plaintiff, (who has a Right to lay his transitory Action where he pleases,) has laid it elsewhere. When an Attorney is Plaintiff, it is indeed settled "that He has " a Privilege to lay his Venue in *Middlesex*:" But it is not so well settled "that he can bring it back thither, " when he is Defendant." In this Case, the Attorney is DEFENDANT: So that it differs from the Cases where an Attorney is Plaintiff. It was, indeed, holden in the Case of *Wigley* and *Morgan*, "that there was no Difference between an Attorney's being Defendant, and his being " Plaintiff." But in Lord Chief Justice HOLT's Time, in Mr. *Harcourt*'s Case, there was a solemn Determination the other Way: And, I believe, the Court of Common Pleas determine the same Way now. Therefore it ought to be looked into. The Rule was (accordingly) enlarged. Of this last Case (of *Wilson* versus *Evans*) I find no further Note: And therefore I suppose that it never came on again.

But

But the same Question was revived in *Hilary* Term 1760, 33 G. 2. B. R. in a Case of *Tattersall* versus *Hill*, an Attorney; upon a Motion of Mr. *Wheler*'s (on Behalf of the Defendant) to change the *Venue* from *Worcestershire* to *Middiesex*; who cited *Wigley* versus *Morgan*, and *Wilcocks*'s Case, as in Point. But Mr. Justice *Denison* answered, that there were other Books to the contrary." And Lord MANSFIELD said, it had been doubted, since He came into this Court, in a Case of *Wilson* and *Evans*, Mr. *Cowper* (Clerk of the Rules) informed the Court "that that Case had never been determined." Whereupon, the Court gave Mr. *Wheler* a Rule to shew Cause. But I believe it ended there: For I never heard any more of the Matter.

Theyer versus *Eastwick*.

ON *Saturday* the 24th of *January*, Mr. *Dunning* moved for a Prohibition to the Consistory Court of *London*, in a Cause of Defamation, for calling the Plaintiff Whore, in *London*.

Two anonymous Cases in *Ventr.* 343 and 352. are in Point.

It was triable at *Common Law*; being punishable in *London*, at *Common Law*, by the *Custom* of *London*.

Lord MANSFIELD doubted, whether the Court could
 • They can judicially take Notice of this Custom of *London*.
not. Argil v.
Hunt, Tr. 5 G. 1. B. R. Driver et Ux' v. Colgate, Hil. 12 G. 2. B. R. Hartopp v. Hoare, P. 16 G. 2. B. R.

But the Suggestion not being drawn up, it was ADJOURNED.

On the *Wednesday* following (28th *January*) this Motion having been renewed—

Mr. Justice ASTON said—It must be upon *Affidavit* of the *Custom* of *London*; and "that the Words were spoken
 † It was so holden in *Hynes v. Thompson, Mich. 12 G. 2. B. R.* and in the abovementioned Case of *Driver et Ux' v. Colgate*.
 "there †."

A Rule was then granted, upon filing such an *Affidavit*. Which Rule was now made absolute.

Mr. Justice ASTON said—It may be as well tried at Law,
as in the Spiritual Court.

Per Cur.—(Lord MANSFIELD absent—)

RULE made ABSOLUTE.

*V. post. p. 2035. Buggin versus Bennett, concerning the
Necessity of an Affidavit to ground a Motion for a
Prohibition.*

The End of *Hilary* Term 1767, 7 G. 3.

Easter Term

7 Geo. 3. B. R. 1767.

Thursday 7th
May 1767.

Fowler *versus* Dunn.

THE Recorder of *London* had moved, Yesterday, for a *Habeas Corpus* to bring up the Body of the Defendant, who stood convicted of Felony, and was upon the Point of Transportation, in Order to be surrendered by his Bail in a Civil Action.

• See 2 Str.
1217. Case of
the Bail of
Peter Vergen.

There was, at first, a Difficulty with the Court, “whether this could be done AFTER Conviction for a Felony, and Sentence of Transportation.” But, at length, They granted the Motion; the Recorder alledging that there was a Precedent in Sir *John Strange’s* Reports*.

N. B. There was a Doubt also with Master *Owen*, “whether there should not be a *Habeas Corpus* on the *Civil Side*.” But He was afterwards satisfied that it must be on the *Crown Side*.

It now appeared that the Man was actually *on Board* a Ship in the River, for Transportation; and that the Ship was ready to sail.

Lord MANSFIELD said that *this* made a very great Difference in the Case. For, under *these* Circumstances, it might be extremely inconvenient: They might as well pray a *Habeas Corpus* to bring him hither, even *after actual Transportation*; for the King’s Writ will run into the Colonies.

Therefore THE COURT, under these Circumstances, refused to grant the Motion.

Nothing taken by the MOTION.

Buggin

Buggin *versus* Bennett.Saturday 9th
May 1767.

THIS was a Question concerning a Prohibition to the Court of Admiralty, to stay Proceedings there in a Suit for Seamen's Wages.

The Ship was destroyed at *Bencoolen*, by Order of the Governor, to prevent her falling into the Hands of the Enemy. The Master of Her agreed "that if the Mariners would assist in unloading the Goods, they should be paid their Wages."

It appeared upon the Proceedings in the Admiralty-Court, "that it was *covenanted* and agreed &c." But it was *not expressly alledged* to be *by Deed*. The Articles were set out at full Length. They were annexed to the Plea, and referred to by it; and the *Locus Sigilli* was marked (L S): And it was prayed "that they might be taken as Part of the Plea." And the Defendant in the Admiralty alledged that it was *covenanted* "and agreed by them, that &c &c." Proceedings went on there, till Sentence was given for the Mariners. *After* Sentence, and not before, the Defendant below moved this Court for a Prohibition; suggesting "that it was a Contract *by Deed*, made *at Land*." The other Side admitted the Execution of the Articles to have been at *Gravesend*.

Mr. Serjeant *Burland* now shewed Cause against the Prohibition. He said that the Defendant below had not pleaded this Deed *there*; but has pleaded *another* Matter, and submitted to the Admiralty-Jurisdiction: And there is a Sentence against Him. He comes *too late*, therefore, *AFTER* Sentence.

AFTER Sentence, the Court will not grant a Prohibition, unless a Defect of Jurisdiction appears upon the *Face* of the Libel. *Winch*, 8. 1 *Ventr.* 343. 1 *Strange*, 187. *Argyle versus Hunt*; and *Symes versus Symes*, (*V. ante*, Vol. 2. p. 813) in *Trin.* 1759.

These Articles are not alledged to be *under Seal*; only, "that they were *in Writing*." Therefore no Defect of Jurisdiction appears.

These Seamen were intitled to their Wages: And they shall be indulged in proceeding in the Admiralty. The Sentence there was given upon the *Merits*. Great Delay Protraction and Expence would be occasioned to them, by the other Side's lying by thus long, and submitting to the Admiralty-Jurisdiction; if
they

they could now at last object to it. This late Application is only for *Vexation*; or calculated to *save Costs*.

Besides, if their Suggestion was better founded than it is, yet here is *no AFFIDAVIT to verify the Truth of the Suggestion*.

The Counsel on the other Side (Sir Fletcher Norton, Mr. Dunning and Mr. Davenport,) relied on the Case of *Howe Esq. versus Nappier**, adjudged in last Michaelmas Term.

* V. ante,
p. 1944.

That was an Application *pending* the Suit, indeed: And this is *after Sentence*. But that Case was fully argued and discussed: And it was settled, "that the Admiralty have no Jurisdiction, "where the Agreement is Special, or by Deed under Seal." And this appears to be a Contract made at Land, by Deed under Seal. For, the Articles are set out at full Length; the *Locus Sigilli* is specifically marked out; they are incorporated with the Answer; it is alledged to be *covenanted* by them, so and so; and the *Execution* of them at *Gravesend*, (which Execution must have been by *Sealing*,) is admitted. From whence it follows, that the Admiralty-Court had no Jurisdiction to proceed at all: And consequently, their Proceedings were *coram non Judice*, and therefore *void*.

And, as this Want of Jurisdiction appears upon the *Face of the Proceedings* below, We do *not* come too late.

If this Court see that an Inferior Court has proceeded *coram non Judice*, they will, in such Case, prohibit them in *any* Stage of the Cause, be it before or after Sentence.

Here, the Court of Admiralty *never had* Jurisdiction: And the Consent or Acquiescence of the Parties can not *give* them a Jurisdiction in an Original Cause, if they really *have none*.

It is the Province of this Court, to see that Inferior Jurisdictions keep within their proper Bounds.

They denied that there was any Need of an *Affidavit* to verify the Truth of the Suggestion. They alledged that no other Affidavit is requisite, in the first Instance of applying for a Prohibition, than an Affidavit to verify the Proceedings below, and "that the Copy of them is a *true Copy*."

THE COURT did not agree to this last Assertion.—They rather thought, that where the Want of Jurisdiction does not appear upon the *Face of the Proceedings*, an *Affidavit* was *necessary*.

LORD MANSFIELD—If it appears upon the *Face of the Proceedings*, “that the Court below have no *jurisdiction*,” a Prohibition may be issued at *any Time*, either before or *after Sentence*: Because All is a *Nullity*; it is *coram non Judice*.

But where it does *not* appear upon the Face of the Proceedings, if the Defendant below will *lie by*, and suffer that Court to go on, under an *apparent Jurisdiction*, (as upon a Contract made at Sea,) it would be unreasonable that this Party who when Defendant below has thus lain by, and *concealed* from the Court below, a *collateral Matter*, should come hither *after Sentence* against him there, and suggest that *collateral Matter* as a Cause of Prohibition, and obtain a Prohibition upon it, *after all this Acquiescence* in the Jurisdiction of the Court below.

Now here is Nothing upon the *Face of these Proceedings*, which shews, that the Admiralty-Court acted *without Jurisdiction*; or, that what they did was *coram non Judice*. The Word “*covenanted*,” alone, is not sufficient to that Purpose: That Expression does not *necessarily* import “that it was a Contract by *Deed*”

In the Case of *Howe versus Nappier*, the Application for a Prohibition was *before Sentence*: This is *after Sentence*, and upon Suggestion, of a *collateral Matter*.

In that Case, no Objection was taken (as well as I can recollect) to the Want of an *Affidavit*. And where the Want of Jurisdiction appears upon the Face of the Proceedings, an *Affidavit* is not necessary; though every Suggestion that does not appear upon the Face of the Proceedings, but is *collateral* and *out of the Proceedings*, ought to be verified by *Affidavit*.

In the Case now before Us, the Matter suggested does *not* appear upon the Face of the Proceedings; but is *collateral*, and *out of them*: And therefore it ought to be verified by *Affidavit*.

Mr. Justice YATES thought the present Case to differ very much from that of *Howe versus Nappier*. In that Case, the *Deed was relied upon*, in the Admiralty-Court; and the Prohibition was applied for, *before Sentence*: And He said, the Court were satisfied, that they were right in the Determination of *that Case*. But in the *present Case*, the Matter suggested was not shewn or urged or relied upon as an Objection to the Jurisdiction of the Court of Admiralty; nor does it appear upon the Face of the Proceedings, “that the Articles were made at Land, “or under Seal.”

IF the Want of Jurisdiction appears upon the *Face* of the Proceedings, there indeed a Prohibition may go at *any* Time: It is indifferent whether it be applied for before or after Sentence. The Reason is, because All is a mere *Nullity*.

If a Prohibition is applied for, the Ground of such Application ought to appear to the Court applied to. If the Want of Jurisdiction *appears* to the Court, there is no Need of an Affidavit to verify it: But if the Matter suggested as a Ground of Prohibition does *not* appear upon the Face of the Proceedings, there must be an *Affidavit* to verify the Truth of it.

Mr. Justice ASTON—The Matter now suggested as a Ground of Prohibition was not made Use of as an Objection below, to oust the Admiralty of Jurisdiction. It should have been tendered to them, as a Plea, to oust them of their Jurisdiction. They had no Notice that there was any Objection to their Jurisdiction. Therefore, even *before* Sentence, it would not be decent to grant a Prohibition, when no such Plea had been tendered to them: Much less, *after* Sentence.

As to an *Affidavit* to verify the Truth of the Suggestion—It is not necessary, where the Defect of Jurisdiction appears upon the *Face* of the Proceedings: But where it arises from Matter *debors*, then there *must* be an Affidavit.

A Suit for Mariners Wages may be brought in the Admiralty. To which Purpose, He cited a Case in 3 *Lev.* 60. *Coke* versus *Cretchet &c.* and another like Case, of *Middleton* versus *Scolly* (mentioned at the End of it;) in both which Cases a Prohibition was denied: “For Mariners Wages *grow due* to them “for Labour done at Sea; and the Charter and Contract at “Land is only to *ascertain* them.” And of this Opinion was *Hale* also; as *North* Chief Justice said, (in the former of these two Cases,) upon Conference with Him at the Desire of the Court of Common Pleas.

The Word “*covenanted*” is only used as a *Description* of the Contract: It does not, of itself alone, shew that it was by *Deed*.

Mr. Justice HEWITT—This Case *admits* the Determination in the Case of *Howe* versus *Nappier*: It does not thwart it at all.

If the Defect of Jurisdiction appears upon the *Face* of the Proceedings, the Whole is a NULLITY: Therefore the Suggestion
I *needs*

needs not be verified by *Affidavit*. But you cannot avail yourself of an Objection *dehors*, without an *Affidavit*.

This Case now before Us is an *unfavourable* Case: The Party has *lain by*, and *not objected* to the Proceedings below.

The Word "*covenanted*" is not, of itself alone, certain enough to shew it to be a *Deed*, so as to oust a Court of Jurisdiction. Therefore it does *not* appear upon the *Face* of the Proceedings "that They wanted Jurisdiction."

It is reasonable to move, before Sentence, for a Prohibition, upon Affidavit of the Truth of the Suggestion, where the Fact suggested is not pleaded. And that was the Case of *Howe* and *Nappier*. But here they have acquiesced till after Sentence; and no Defect of Jurisdiction appears upon the Face of the Proceedings. We may therefore *refuse* this Prohibition *consistently* with the Resolution of the Case of *Howe* versus *Nappier*.

Here Sir *Fletcher Norton* urged that Want of Jurisdiction *does appear upon the Face* of the Proceedings. For, it *does* appear upon the Allegation, "that it *was* a Contract by *Deed*." And the Articles are *annexed*, and referred to; and 'tis prayed that they may be taken as *Part* of the Plea.

THE COURT answered Him, that this Allegation with it's *Reference*, makes no Difference: It does *not prove* "that the "Contract *was by Deed*." Every Matter *dehors* must, after Sentence, be verified by *Affidavit*. Why did they not *rely* upon this Objection below? Why did they lie by, and acquiesce, till after Sentence.

PROHIBITION DENIED; and RULE DISCHARGED.

On the *Monday* following, Mr. Justice ASTON informed the Court and the Bar, that He had, since *Saturday*, found two Cases relating to the Necessity of an *Affidavit* being produced, in Order to ground a Motion for a Prohibition; *viz.* *Hynes* versus *Thompson*, *Michaemas* 1738. 12 G. 2. B. R. and *Driver* versus *Colgate*, *Hil.* 1738. 12 G. 2. (the next Term) in B. R.

In the former Case, Mr. *Denison* shewed Cause against a Prohibition to the Ecclesiastical Court of the Bishop of *Bristol*, to stay a Suit there, for calling a Woman "Whore," in *Bristol*. He objected, that the Suggestion, which was "that there is a "Custom in *Bristol*, (like the Custom in *London*,) that the "Words, if spoken there, are actionable; and that the Party is "corporally punishable there &c; and that the Words *were* "spoken in *Bristol*;" was not verified by *Affidavit*, as it ought to have been. He also objected, that this Matter ought to have been
pleaded

pleaded below: Which was not even suggested. Lord Chief Justice LEE said, He did not see that any Thing was verified. And thereupon, the Rule was discharged*.

* According to my own Note of this

Cafe, there was a Suggestion of the Custom; but no Affidavit "that the Words were *spoken in Bristol*." I have Notes of *both* these Cafes, agreeable to the Account here given of them.

In the latter Cafe of *Driver* versus *Colgate*, Mr. Robinson moved for a Prohibition to the Consistory Court of *London*, to stay a Suit there, for calling a Woman "Whore," in *London*; because though there was an Affidavit "that the Words were spoken in *London*;" yet the Custom was *only suggested*, but NOT *pleaded*. The Court held, that the Custom must be *either verified by Affidavit*, or *pleaded*: But a Suggestion alone was NOT sufficient.

In the former Cafe of *Hynes* versus *Thompson*, Lord Chief Justice LEE laid down the Rule to be—"That if you move for a Prohibition, upon any Thing not appearing upon the Face of the Proceedings, you ought to have an *Affidavit* of the Truth of the Suggestion." And he cited *Godfrey* versus *Llewellyn*, 2 *Salk.* 549. in Point; and 2 *Salk.* 551. Pl. 17. Where MOLT Chief Justice laid down the Law to be, "That wherever the Matter which you suggest for a Prohibition, is *foreign* to the Libel, you must *plead* it below, before you can have a Prohibition: Otherwise, where the Cause of Prohibition appears *upon* the Libel." And Lord Chief Justice LEE said, in that Cafe of *Hynes* versus *Thompson*, that He thought it must either be *pleaded* "that there was such a Custom," or an *Affidavit* of it. And Mr. Justice Chapple hinted that Prohibitions had been too easily granted: And was of Opinion that there ought to be an Affidavit to verify the Suggestion.

In the latter Cafe of *Driver* versus *Colgate*, the Court held that there was no Necessity to *plead* it below, in Cafes of Prohibitions for Words spoken where they are by the Custom actionable, as there is in Cafe of a Prohibition on Suggestion of a *Modus*. For, in the former Cafe, they can not go on, if the Suggestion be true: But in the latter, of a *Modus*—If the *Modus* be admitted in the Spiritual Court, they may go on; because the Jurisdiction continues.

So here, as Mr. Justice ASTON observed, the Deed *not appearing to be under Seal*, it would be a like Admission, as admitting a *Modus*.

† V. ante, p. 2032. Theyer v. Eastwick,

In all other Cafes†, they laid down a general Rule, "that it must either be *pleaded* below, or *verified by Affidavit*."

Wright

Wright *versus* Fawcett, Esq.

(In the Crown Paper.)

Wednesday
13th May
1767.

THIS was a Return to a Mandamus directed to *Christopher Fawcett* Esq. Steward of the Court-Leet of the Burrough of *Morpeth*, commanding him to admit and swear *Joseph Wright* a Freeman of *Morpeth*. It set forth that the Burrough of *Morpeth* is an ancient Burrough; and that the said *Joseph Wright* had been *duly elected a Freeman* of the said Burrough, and *thereby became lawfully intitled to be sworn and admitted*, and *ought by the Steward to be sworn and admitted* into the Place and Office of One of the Freemen of the said Burrough. It then set forth that the said *Joseph Wright*, after his Election, duly tendered and presented Himself &c, and demanded of the Steward to be by Him sworn and admitted into the said Place and Office *according to the Custom of the said Burrough*: Yet that the Steward, *well knowing the Premises, but having no Regard for the Duty of his Office in that Behalf*, did then and there, *without any reasonable Cause*, absolutely refuse and yet doth refuse to swear and admit the said *Joseph Wright* into the said Place and Office &c. The Writ therefore commands the Steward to swear and admit or cause Him to be sworn and admitted into the said Place and Office &c; and to administer or cause to be administered to Him all the Oaths which are in such Case usually administered and taken; OR *shew Us Cause to the Contrary thereof*, &c.

Mr. *Fawcett* returns That the Manor and Burrough of *Morpeth* now are, and from Time whereof the Memory of Man is not to the Contrary have been, an ancient Manor and Burrough; and that the Free Burgeses or Freemen of the Burrough of *Morpeth* aforesaid now are and immemorially have been a Body Corporate and Politic in Deed Fact and Name &c; and that the Place and Office of a Free Burges of the said Burrough, and the Place and Office of a Freeman of the said Burrough, are and immemorially have been One and the same Place and Office. The Return then proceeds to alledge, that the Right Honourable *Frederick Earl of Carlisle*, at the Time of issuing the said Writ, and also at the Time when the said *Joseph Wright* demanded of Him to be by Him sworn and admitted into the Place and Office of One of the Freemen of the said Burrough, and long before, was, and continually from thenceforth hitherto (to the Time of the Return) hath been, and yet is Lord of the Manor and Burrough of *Morpeth* aforesaid; and that the said Earl and all other Lords of the said Manor and Burrough for the Time being, from Time whereof the Memory of Man is not to the

Contrary, have had and have used and accustomed and of Right ought to have a *Court-LEET* or View of Frankpledge held and to be held in and for the said Manor and Burrough, before their Steward of the said Court for the Time being, twice in every Year, (Once &c, and again &c,) as belonging and appertaining to the said Manor and Burrough. The Return further certifies and alledges, that the said Earl and all other Lords of the said Manor and Burrough for the Time being, from Time whereof the Memory of Man is not to the contrary, have had and have used and been accustomed to have, and of Right ought to have certain *Courts-BARON* holden and to be holden in and for the said Manor and Burrough at certain times of the Year, that is to say, on the Days when the said Court-Leet or View of Frankpledge hath been and ought to be holden as aforesaid, and also on *Monday* next after the Feast of the *Epiphany*, as to the said Manor and Burrough belonging and appertaining. Mr. *Fawcett* further certifies and returns that within the said Manor and Burrough there now is and from Time whereof the Memory of Man is not to the Contrary hath been a certain ancient and laudable Custom there used and approved, that is to say, "That the
" Jurors sworn and charged, at every such Court-Leet or View
" of Frankpledge so held and to be held in and for the said
" Manor and Burrough as aforesaid, to inquire and present those
" Things which to the View of Frankpledge belonged and be-
" longs to inquire and present, during all the Time aforesaid
" have used and been accustomed and of Right ought to be Free
" Burgeffes or Freemen of the said Burrough of *Morpeth*; and
" Each of Them, during all the Time aforesaid, hath been and
" hath been used and been accustomed and of Right ought to be a
" Free Burgefs or Freeman of the said Burrough;" and that within the said Burrough there now is and for all the said Time whereof the Memory of Man is not to the Contrary there hath been a certain other ancient and laudable Custom there used and approved, that is to say, "That the Jurors sworn to serve and
" serving at every Court-Baron held and to be held in and for
" the said Manor and Burrough, during all the Time aforesaid,
" have been and have used and been accustomed, and of Right
" ought to be Free Burgeffes or Freemen of the said Burrough;
" and Each of Them, during all the Time aforesaid, hath been
" and hath used and been accustomed and of Right ought to be
" a Free Burgefs or Freeman of the said Burrough." He further certifies and returns, that within the said Burrough of *Morpeth* there now is and for all the said Time whereof the Memory of Man is not to the Contrary there hath been a certain other ancient and laudable Custom there used and approved, that is to say, "That EVERY Person admitted and sworn into the Place and
" Office of a Free Burgefs or Freeman of the said Burrough hath
" been and hath used and been accustomed, and of Right ought to
" be, BEFORE his being admitted and sworn into the Place and
" Office

“ Office of a Free Burgefs or Freeman of the faid Burrough, AP-
 “ PROVED-of by the LORD OF THE SAID MANOR AND BUR-
 “ ROUGH, to be a Free Burgefs or Freeman of the faid Bur-
 “ rough.” He further certifies and returns, that the faid *Joseph Wright* was NOT *duly* ELECTED a Freeman of the faid Burrough, as in and by the faid Writ is fupposed: And He further certifies and returns, that the faid *Joseph Wright* NEVER was APPROVED-of by the faid Earl of Carlisle or any other Lord of the faid Manor and Burrough of Morpeth to be a Free Burgefs or Freeman of the faid Burrough. And for THESE Reasons, He fays, He has not fworn and admitted or caufed to be fworn and admitted the faid *Joseph Wright* into the faid Place and Office of One of the Freeman of the faid Burrough &c; neither has He adminiftered or caufed to be adminiftered to the faid *Joseph Wright* All the Oaths which are in fuch Cafe ufually adminiftered and taken, as by the Writ is commanded; nor can nor ought He fo to do.

Mr. Walker, on Behalf of the Profecutor, objected to this Return, “ that it was DOUBLE, and therefore bad.”

A double Plea could not be admitted, even in a Civil Cafe, before the Statute of 4 & 5 Ann. c. 16. § 4. And that Act does not extend to any other than Civil Cafes. He then entered into the Reasons of it; and argued upon them at large.

Mr. Wallace, *contra*, faid the Steward was required to admit and swear Him; OR to fhew Cause why He does not. He fhews two good Cafes: Which He certainly may do.

The Practice is fo; as appears by the Cafe of *Green verfus Mayor of Durham* *. And in the Cafe of *Ward verfus Mayor of Newcastle* (very lately,) feparate Issues were found: And the Pro-
 * V. ante, p. 127.
 fecutor of the Writ was not admitted.

In 2 Lord Raym. 1244. 5 Ann. Regina verfus Mayor and Aldermen of Norwich, upon a Mandamus to admit and swear One Dunch an Alderman of Norwich; Holt, Chief Juftice faid—“ that
 “ a Return may contain as many Cafes as the Persons that make
 “ the Return please.” In 1 Salk. 436. S. C. it is exprefsly faid,
 “ that the Court agreed that feveral Cafes may be returned.”

Mr. Walker's Reasoning applies to Pleading only. But different Facts may be replied in one Replication.

Mr. Walker replied, that there is no Difference between Answers to the King, and Answers to a Party: And, By Common Law, a double Answer can not be given to a Party. Therefore, neither can it to the King.

Here

Here we suggest only a single Fact, *viz.* "that He was duly elected." This double Answer puts it upon the Crown to shew that *Both* the Answers are false. If They can give *two* Answers, They may give Two Thousand: And it can not be supposed that the Crown should be put to shew them *all* to be bad. Besides, this would also distract the Attention of the Court.

* V. ante,
Vol. 1.
p. 127.

In *Green's Case*, no Exception was taken to the Form of the Return: They took Traverses*. *Dunch's Case* was not argued upon that Point. In that Case, Mr. Justice *Powell* said, "If the Return be not contradictory, it is very inveigling: The Court cannot tell what you rely upon†."

† 2 Ld. Raym.
1245.

The Answer ought to be a SIMPLE Answer; though it may include several Facts.

The Statute of 9 *Ann. c. 20.* does not justify a *double Return*; though it allows several Traverses.

LORD MANSFIELD—I see no Doubt upon this Case. Here is a Duplicity in the Writ; which requires a Duplicity in the Return. The Writ states "that He was duly elected; and that He *thereby* became intitled to be sworn." The Answer is, "that He was *not duly elected*:" And further, "that He was not intitled to be *sworn* in; because He has not been previously approved-of by the Lord of the Manor; which is essentially necessary, according to a Custom which the Steward sets forth, to be done *before* He can be admitted and sworn."

Mr. *Walker's* Argument would strip Him of One Half of his Case, He has two *decisive* Answers: And why should He be obliged to give up *One* of them? He is commanded to admit and swear Him; *or* shew Cause to the Contrary. And He shews a good Reason for not admitting and swearing Him. He says, this Person was *neither elected nor approved*: Both which Qualifications were essentially necessary.

† V. 4 & 5
Ann. c. 16.
§ 4.

Where a Man has *two conclusive Answers*, it is contrary to every Principle of Justice to *confin*e Him to One of them *alone*: 'Tis a Rule which *never should* have been received; and the Legislature have *set it right*, by opening the Defence, and admitting the Defendant to plead several Pleas‡.

The Prosecutor can not be surprized: For, *both* Causes are specified to Him, in the Return. And as to the Distraction of the Attention of the Court or Jury—This is as much an Objection to taking several Issues on Mandamuses. And the *Authorities*

thorities, as well as the Reason of the Thing, are on this Side of the Question.

Mr. Justice YATES—Several *consistent* Causes may be returned to a Mandamus: The *Number* of them makes no Difference.

Mandamuses are distinguishable from the Case of *Civil* Actions.

Civil Actions concern *private Rights* between Party and Party: In *Civil* Actions, Nothing is in Question, wherein the *Public* is concerned. And the Defendant must, in these private Cases, know his own Defence, and upon what Foot he is to put it.

But in a *Mandamus* relating to a *public* Office, the Question is “Whether the Person ought or ought not to be admitted to the “Office.” And if He can be shewn to be an Usurper, the Court will not admit Him; for They ought not to admit an *Usurper*: But if he has a Right, he ought to be admitted.

The Question here is, “Whether upon the *whole* Matter, “He ought to be admitted.” The Steward is, by this Writ, commanded either to admit; or to shew Cause why He does not. And He may shew One or more Causes; provided they be consistent. Therefore this is distinguishable from *Pleas* to *Civil* Actions.

Mr. Justice ASTON—The Return is good, where it answers the Supposal of the Writ. This Writ charges the Steward *criminally*. It charges Him with refusing to admit and swear this Mr. *Wright*, well knowing the Premises, but having *no Regard for the Duty of his Office* in that Behalf. So that the Steward is charged as *criminal* in that He did not admit and swear Him: And being so charged with a *Breach* of his Duty, He may return as many *consistent* Answers as He will. And this Answer is consistent: For it directly follows the Supposal of the Writ.

Mr. Justice HEWITT—This being a Matter of a *public* Nature differs from *private civil* Causes.

If the Steward might not return several Causes, where there really are several good Objections to the Prosecutor of the Mandamus, an *Usurper* might be admitted into a public Office, which He has no Right to.

There is no Authority to warrant the Objection: The Authorities are on the other Side. Therefore He concurred in holding the Return to be sufficient.

Per CUR'. unanimously—

RETURN ALLOWED.

Thursday 14th
May 1767.

Rex versus John Tucker and Eleven Others.

THE Defendant and Eleven Others had been indicted in the same Indictment, which was for unlawfully exercising the Trade or Mystery of tanning Leather contrary to the Statute of 1 Jac. 1. c. 22. § 5. concerning cutting and tanning Leather.

On *Thursday* 5th Feb. last, it was objected by Mr. *Ashurst*, who moved on behalf of the Defendants, to quash the Indictment—1st. That this is *not an indictable Offence*: For the Prosecutor ought to pursue the *Penalty* annexed to the Offence, which is specified in one and the same Clause of the Act; *viz.* Forfeiture of the Leather tanned, or the just Value thereof. And 2dly That *several* Defendants can not be *joined* in One and the same Indictment.

A Rule was then made to shew Cause: And it was now made absolute. Mr. *Wallace*, for the Prosecutor, said He thought He could support the Indictment, upon the *first* Objection; but He could not upon the *Second*.

Whereupon—

RULE made ABSOLUTE (for quashing the Indictment.)

Friday 15th
May 1767.

Wright and Rathbone, Assignees of Richard Scott, a Bankrupt, *against* George Campbell, the Younger, and Stephen Hayes.

THIS was an Action of Trover brought by the Assignees of Scott a Bankrupt. The Plaintiffs declare upon their Possession of certain Quantities of Wheat and Beans, and lay their Damage at 1000*l*. The Defendants plead the general Issue. The Cause was tried before Mr. Justice *Bathurst* at *Lancaster-Assizes*
on

on 21st March 1767: When it is stated to have appeared in Evidence—

That *Lewis Fontaine*, a Merchant in London, on 4th June, shipped the Goods mentioned in the Declaration on Board a Ship called *The Two Friends*, whereof *William Spencer* was Master, then in the Port of London and bound upon a Voyage to *Liverpool*: And that the said *William Spencer* thereupon signed two Bills of Lading, of the same Tenor and Date as follows—

Shipped by the Grace of God, in good Order and well conditioned, by *Lewis Fontaine*, in and upon the good Ship called *The Friends*, whereof is Master, under God, for this present Voyage, *William Spencer*, and now riding at Anchor in the River of *Thames*, and by God's Grace bound for *Liverpool*, to say, 102 Quarters 4 Bushels of Wheat, in 164 Sacks; and 217 Quarters 4 Bushels of Beans, in 348 Sacks, 20 Matts, being marked and numbered as in the Margin; and are to be delivered in the like good Order and well-conditioned at the aforesaid Port of *Liverpool*, the Danger of the Sea only excepted, unto Order or to Assigns; He or They paying Freight for the said Goods as per Charter-party. In Witness whereof, the Master or Purser of the said Ship hath affirmed to two Bills of Lading, All of this Tenor and Date: The One of which Bills being accomplished, the Other to stand void. And so God send the good Ship to her desired Port in Safety: Amen.

Qrs.	Bush.	
102	4	Wheat, in 164 Sacks.
217	4	Beans, in 348 Ditto.
320	—	Quarters. 512 Sacks.
		20 Matts.

Dated in London, 4th June 1766.

William Spencer.

That Mr. *Fontaine*, on the same Day, indorsed One of the Bills of Lading to *Richard Swanwick*, who was then a Merchant in *Liverpool*, as follows; viz. “*Deliver the within to Mr. Richard Swanwick or Order. Lewis Fontaine;*” and, by the next Post, sent the Bill of Lading, so indorsed, to Mr. *Swanwick* at *Liverpool*; which was received by him.

That on 2d July following, *Swanwick*, being arrested by the Sheriff of *Lancashire* for the Sum of 400 l. at the Suit of Messrs. *Guinand* and *Hankey*, applied to *Richard Scott*, who was also a Merchant at *Liverpool*, with whom *Swanwick* had had Dealings in giving out and taking Credit upon Notes and Bills of Exchange, and to whom *Swanwick* was then indebted (upon Balance) in the Sum of 800 l. or upwards, to become Bail for Him to the Sheriff: Which *Scott* refused doing, unless *Swanwick* would give him a Security to indemnify him against the Consequences of becoming Bail, and also a Security for his Debt. Upon this, *Swanwick* produced the Bill of Lading which he had received indorsed from *Fontaine*, and offered to indorse it to *Scott*; assuring

Scott

Scott "that the Goods comprized in it were *his own Property*, " and that *he had paid for them*;" (which was not true.) Upon this, it was agreed between *Swanwick* and *Scott*, that *Scott* should become Bail to the Sheriff; that *Swanwick* should indorse the Bill of Lading to *Scott*; and that He should sell the Goods, and should out of the Produce be indemnified; and what remained should be applied towards Satisfaction of the Debt due from *Swanwick* to *Scott*. And upon this, *Scott* became Bail; and *Swanwick* indorsed the Bill of Lading to *Scott*, as follows; viz. "Deliver the within to Mr. Richard * *Swanwick* or Order; Value received. *Richard Swanwick*"—and delivered the same to *Scott*.

* This should be *Scott*, I suppose.

That, the Day following, *Fontaine*, being come down from *London*, applied to *Scott* concerning the Bill of Lading which had been so indorsed; and informed him "that the Goods comprized in the Bill of Lading had been consigned by Him to *Swanwick as a Factor only*, to be disposed of for Him (*Fontaine*:") Which was the Truth; though *Swanwick* had represented himself to *Scott*, as the real Proprietor. And *Fontaine* then insisted upon *Scott*'s relinquishing any Right or Claim he might have under the Bill of Lading: Which he refused to do. Then *Fontaine* made an Indorsement upon the other Bill of Lading, for the Delivery of the Goods to the Defendants.

That, in a few days afterwards, the Ship arrived with the Goods at *Liverpool*; and *Scott* demanded the same of the Master, by Virtue of the Bill of Lading which had been indorsed to him; and tendered the Freight and Charges: But the Master, having received an Indemnity from the Defendants, refused to deliver the Goods to *Scott*, and afterwards delivered them to the Defendants.

That *Scott* and *Swanwick*, soon afterwards, severally became Bankrupts, and a Commission duly issued against Each of them, and they were thereupon respectively found Bankrupts, and *Scott*'s Effects were properly assigned to the Plaintiffs; who demanded the Goods of the Defendants, and tendered to them the Freight and Charges and other Expences: But they refused to deliver them, and afterwards converted them to their own Use.

Upon which, a Verdict was found for the Plaintiffs, for 431*l.* 11*s.* being the nett Value of the Goods, and 40*s.* Costs; subject to the Opinion of the Court, "Whether the Plaintiffs, " under the Circumstances of this Case, are intitled to recover against the Defendants.

Mr. *Wallace*, on Behalf of the Plaintiffs (the Assignees,) argued that They had a Right to recover.

By Indorsement of a Bill of Lading, the Property is transferred; and the Consignee has such a Property in it, that He may assign it over. 1 *Ld. Raym.* 271. *Evans versus Martlet* *, *M.* 9. *W.* 3. *B. R.* * *V.* 12 *Mod.* 156. and 3 *Salk.* 290. *S. C.*

This Assignment is absolute: Here is no Trust, no Confidence, no Restriction. *Swanwick* might have assigned and transferred the Right of it, before the Arrival of the Ship.

Here was no Notice of the Goods being the Property of *Fontaine*.

Scott was a Purchaser for a valuable Consideration, without Notice.

Fontaine might, if He had thought proper, have consigned the Goods to *Swanwick*, as *Factor*: On the Contrary, He has consigned them to Him or Order, *absolutely*. The Goods pass by Indorsement, as much as Money on the Indorsement of a Bill of Exchange: And *Swanwick* might transfer the Right just as well as he might have done upon a Bill of Exchange.

Mr. *Davenport*, *contra*, for the Defendant, cited 1 *Salk.* 160. *Whitecomb versus Jacob*; where it was solemnly settled that Goods or Merchandise in the Hands of a Factor shall be taken as Part of the Merchant's Estate (the Employer's,) and not the Factor's.

Swanwick could neither sell nor pledge this Bill of Lading: For, He must be considered as a *Factor*; and a Factor has no such Right. 2 *Str.* 1178. *Paterfon versus Tash*. "He can only *sell*: He can not pledge the Goods, as a Security for his own *Debt*."

Here was no Consideration-Money paid for this Indorsement of the Bill of Lading from *Swanwick* to *Scott*: It was done, to indemnify and secure Him, upon his becoming Bail for Mr. *Scott*.

The Assurances given by *Swanwick* to *Scott* are stated "not to have been true." But whatever the Consideration of *Swanwick's* Indorsing to *Scott* might be, yet He could not transfer more than He had: And the Assignees can have no better Right than the Consignee had.

The Goods never came to the Hands of *Scott*: If they had ever been in his Possession, that might have been a strong Case. But Mr. *Fontaine*'s Representatives have the Goods in *their* Hands.

How can Mr. *Scott* keep Goods of perhaps the Value of 1000 *l.* to indemnify Him from becoming Bail for four or five hundred? He pretends to be *liable* to the Action of *Guinand* and *Hankey*, as Bail: But it does *not appear* that He either has actually paid, or is even liable to pay any Thing.

Being equal in Right, the Condition of the *Possessor* is the Best. But this seems to be a Trick between *Swanwick* and *Scott*, to cheat Mr. *Fontaine*, the true Owner of the Goods.

The Right continued in the true Owner.

Mr. *Wallace*, in Reply—*Swanwick* was to sell the Goods as a Trustee for *Fontaine*.

It is not material, whether there was a real Debt due from *Swanwick* to *Guinand* and *Hankey*, or not. The becoming Bail for Him was a good Consideration. And there was a *bonâ fide* Debt, at the same Time due from *Swanwick* to *Scott*. It was a quite fair Transaction between Them.

If there is no Damnification at all, the Indorsee would have stood (in Equity) in the Place of the Indorser. The Bill of Lading, being absolutely indorsed to *Swanwick*, the Property of the Goods was vested in Him. This is a Case between a *bonâ fide* Purchaser, and a Consigner: And here, the Consigner had absolutely parted with his Property to *Swanwick*; who, for a valuable Consideration assigned to *Scott*.

LORD MANSFIELD—In the present Case, Law and Equity are the same.

This is clear, that if there is an Authority never so general, by Indorsement upon a Bill of Lading, without disclosing that the Indorsee is Factor, the Owner (as between Him and the Factor) retains a Lien, till Delivery of the Goods, and before they are actually sold and turned into Money.

If the Factor plays it over, *with Notice*, to a third Person, then it may be followed in the Hands of such third Person: For, in such Case, It remains in his Hands just as it did in the Hands of the *Factor Himself*.

But

But if the Goods are *bonâ fide* sold by the Factor *at Sea* (as they may be, where no other Delivery can be given) it will be good, notwithstanding the Statute of 21 Jac. 1. c. 19. the Vendee shall hold them by Virtue of the Bill of Sale, though no actual Possession is delivered: And the Owner can never dispute with the Vendee; because the Goods were sold *bonâ fide* and by the Owner's own Authority.

If so, then the Whole of this Case turns upon this Question, "Whether this was a fair Transaction, *bonâ fide*, between Swanwick and Scott, for a valuable Consideration, and without Notice; or a Trick and Contrivance between them to cheat an honest Owner out of his Property."

Now this, which is the material Fact, is *not stated*.

Scott never inquired into the Fact, whether Swanwick had really bought the Goods, or was the real Owner of them. It is indeed stated that Swanwick told Scott "that the Goods were his own, and that he had paid for them." But did Scott believe Him? *That* does not appear. He trusted to Swanwick's Word. No Letters were produced: No Price fixed.

Security against the Consequences of becoming Bail is the Pretext. But the being Bail for Swanwick could be *no Part of the Consideration*: For Scott's Debt from Swanwick was at least 800*l*. And the Value of the Goods was only 431*l*. Therefore Nothing was left for the securing Him as Bail.

The Circumstances of the Case, as stated, are excessively strong to shew that these two Men contrived to cheat a Third; and that the Transaction between them was *fraudulent*. But this is not stated: The Case is therefore *imperfectly stated*.

The THREE Other JUDGES agreed that here seemed to be a *fraudulent Collusion* between Swanwick and Scott: But that the *Facts were not sufficiently stated*. Wherefore—

LORD MANSFIELD—Let there be a New Trial, without Costs.

RULE accordingly.

Long

Tuesday 19th
May 1767.

Long *versus* Dennis.

THIS was an Ejectment brought by *Job Long*, on the Demise of *William Hurley* and *Mary* his Wife, against *Abraham Dennis*. It was tried at the last Assizes for the County of *Devon*, before Mr. Justice *Gould*: And a Point was reserved, upon the following Special Case.

CASE—*Robert Ballyman*, being seised in Fee-simple, duly made his Will &c, dated 11 March 1727; and thereby devised unto *Richard Clarke* and *Peter Kerlake* their Heirs and Assigns, all that his Messuage Tenement or Farm called *Parke &c*; UPON TRUST to pay the yearly Rents and Profits thereof, by Quarterly Payments, to his Son *Robert Ballyman* during his said Son's natural Life: And from and after his Decease, the Trustees and their Heirs were to stand seised of the Premises, to the Use of such Woman as should be his Wife at the Time of his Death, during the Term of her natural Life, for her Jointure; subject to the Proviso or Condition next in the said Will particularly mentioned and expressed; And from and after the Deaths of his said Son *Robert* and such Woman as should be his Wife at the Time of his Death, then in Trust to and for the Use and Behoof of the first Son of the Body of the said *Robert* his Son lawfully to be begotten, and the Heirs of the Body of such first Son lawfully issuing; subject nevertheless to the said Proviso or Condition; and for Want of such Issue, to the second third fourth fifth and all and every other Son and Sons of the Body of his said Son *Robert* lawfully to be begotten, and the Heirs of their several Bodies severally respectively and successively issuing, as They should be in Seniority of Age and Priority of Birth &c; subject to the said Proviso or Condition; and for Want of Issue Male of the Body of his said Son *Robert*, then to the Use and Behoof of All and Every the Daughter and Daughters of his Body lawfully to be begotten, and the Heirs of their several Bodies; subject to the said Proviso or Condition; and for Want of such Issue, then to the Use and Behoof of his [own] two Daughters *Hannah Ballyman* and *Elizabeth Ballyman* their Heirs and Assigns for ever. PROVIDED always, and it was his very Will, true Intent, and express Meaning, " That in Case his said Son *Robert* should marry with any Woman not having a competent Marriage-Portion; OR without the Consent and Approbation of the said Trustees their Heirs or Assigns, in Writing under their Hands and Seals, to be executed in the Presence of Two or more credible Witnesses, first had and obtained; that then his said Trustees and their Heirs and Assigns, immediately after the Death and Decease of his said Son *Robert*,

I

" should

“ should stand and be seised of the said Messuage and Tene-
“ ment or Farm called *Parke*, with the Appurtenances, to and
“ for the only Use and Behoof of his said two Daughters *Han-*
“ *nab* and *Elizabeth* and their Heirs for ever; any Trust, Use,
“ Bequest, Limitation or Devise thereof to or to the Use of his
“ said Son *Robert*, or to such Woman as should be his Wife at
“ the Time of his Death, or to the Heirs of the Body of the
“ said *Robert*, or any other Trust Use Limitation Bequest or
“ Devise, or any other Thing in that his Will contained, to the
“ Contrary thereof in any wise notwithstanding.” And his
Will, true Intent, and Meaning was, and He did declare “ That
“ the said Proviso or Condition therein before expressly men-
“ tioned was NOT intended by Him nor to be construed or taken to
“ be IN TERROREM; but a CONDITION, for Want of Perfor-
“ mance whereof in every Respect, the said Lands called *Parke*
“ should in no Case be vested in such Wife of his said Son *Robert*
“ nor the Heirs of that Marriage, but (on the Contrary) that his
“ said Trustees and their Heirs should be seised of the said
“ Premises to the only Use and Behoof of his said two Daugh-
“ ters and their Heirs, in Manner aforesaid.” And after giving
several Legacies among his Daughters, He made the said *Hannah*
and *Elizabeth* his Daughters residuary Legatees and Executrices.
Which Will he duly signed sealed published and declared in the
Presence of three subscribing Witnesses, who duly attested the
Execution thereof.

The Testator *Robert Ballyman* died seised, on 18th October
1730.

Robert Ballyman the Son married *Mary Stephens*, on 28th of
May 1739.

In January 1765, He died; and was buried the 29th Day of
the same Month; leaving the said *Mary* his Widow, and One
Daughter called *Maria*, Both now living: Which said *Maria*
married the said *Abraham Dennis* the Defendant.

Hannah Ballyman, One of the said Testator's Daughters and
Devisees named in his Will, died in the Month of October 1751,
in the Life-time of her said Sister *Elizabeth*.

The said *Elizabeth*, the Other of the Testator's Daughters and
Devisees, on the 6th Day of May 1732, married with the said
Richard Clarke; and had Issue, by Him, *Mary* their Daughter,
baptized 17th of April 1734, now Wife of *William Hurley*.

The said *Richard Clarke* and *Peter Kerlake*, the two Trustees,
were Both living, at the Marriage of the said *Robert Ballyman*
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with *Mary Stephens*. The said *Kerlake* died in November 1740: And the said *Clarke* died in February 1748.

The said *Elizabeth*, the Wife of the said *Clarke*, survived Him and also the said *Hannah* her Sister; and died in December 1754, leaving the said *Mary* her only Child and Heir at Law; who, on the 29th Day of June 1761, married with the said *William Hurley*: Which said *William Hurley* and *Mary* his Wife are the Lessors of the Plaintiff.

The said *Hurley* and his Wife, in Right of the said *Mary*, as Heir at Law of the said *Elizabeth* her Mother, claimed Title to the said Messuage Tenement Farm and Premises, under the said *Proviso* in the said Testator's Will; alledging "That the said *Mary Stephens* was a Woman of no Circumstances, and had not a competent Marriage-Portion at the Time of her Marriage with the said *Ballyman* the Son; and that They were married without the Consent of the said Trustees first had according to the Intentions and Directions of the said Testator's Will."

In Pursuance thereof, the Lessors of the Plaintiff delivered an Ejectment for recovering Possession of the said Premises: To which the said Defendant *Dennis* appeared, and entered into the Common Rule, and pleaded. And Issue being joined, the Cause came on to be tried at the last Assizes for the County of Devon: When the Jury found—"That the said *Mary Stephens*, at the Time of her Marriage with the said *Robert Ballyman*, HAD a competent Marriage-Portion; but that the said *Robert Ballyman* married her WITHOUT any Consent or Approbation of the said Trustees named in the said Will;" and thereupon found a Verdict for the Plaintiff, subject to the Opinion of this Court upon the following Question—"Whether the Lessors of the Plaintiff have a Title to recover the said Premises."

Mr. Gould, for the Plaintiff, argued that though the Son's Wife had a competent Fortune, yet as the Words were in the Disjunctive, it was necessary that He should also have the Consent of the Trustees. To this Purpose He cited the Cases of *Harvey et al. versus Aston et al. Comyns* 726. and *Creagh et Ux. versus Wilson et al. 2 Vern.* 572. He said, this was a Condition precedent: And, to prove it to be so, He cited *Bro. Title "Conditions," pl. 67.* By the Words of the Will, this Estate could not have vested, till the Condition was performed. It is very strongly and particularly declared and expressed in the Will, "that the Estate should not vest in the Heirs of such Marriage, unless the Condition should be performed." *Cary versus Bertie et al. 2 Vern.* 333.

It

It will be objected "that the Trustee might have an *Interest* to defeat the Condition, having married One of the Testator's Daughters."

But that Objection will not hold in this Court. No such Objection was offered in the Case of *Creagh et Ux'. versus Wilson*, 2 Vern. 572. and in *Harvey et al. versus Aston et al'. Comyns* 750. it is said—"As to the Supposition That such a Trustee may act out of Interest, or for By-Ends, and so refuse Consent without any Ground, such Proceeding would surely be a Breach of Trust; which this Court (the Chancery) may find Means to remedy, as well as in Case of other Breaches of Trust."

In the present Case, this Condition is *not well performed*: And therefore the Lessors of the Plaintiff ought to have Judgment.

Mr. Serjeant *Glynn*, who was to have argued for the Defendant, was not come down. But Lord MANSFIELD said He was quite clear on his Side, without hearing Him.

Lord MANSFIELD—Conditions in Restraint of Marriage are *odious*; and are therefore held to the utmost Rigour and Strictness. They are contrary to sound Policy. By the *Roman Law*, they are all void.

Conditions *precedent*, must previously exist. Therefore in *these*, there can be no *Liberality*, except in the Construction of the Clauses.

But in Cases of Conditions *subsequent*, It has been established by Precedents, that where the Estate is not given over, they shall be considered as *only in Terrorem*. This shews how Odious such Conditions are: For, in Reason and Argument, the Distinction between being or not being limited over is very nice; and a Clause can carry very little Terror, which is adjudged to be of no Effect. Though, to be sure, the Reasoning will not hold. If the Estate is given over, such a Condition can not be got over.

The present Case is *doubly in Terrorem*; and made so by adding the Clause "that the said Proviso or Condition was not intended by Him, nor to be construed or taken to be *in Terrorem*."

In the Case of *Daley versus Clanricarde*, in Chancery, 10th December 1738, the Condition was—"that she should marry with the Consent of Trustees;" if not, the Estate was given over. The Trustees were applied to: They offered to agree, on a proper

per Settlement being made. The Marriage was had, without their Knowledge: But the Settlement being afterwards made, their conditional Consent was holden to be sufficient.

In the Case of *Burlton et Ux'. versus Humphries and Others*, 20th February 1755. in *Canc'*. the Condition was, "that if She married without the Consent of N. H. in Writing, then &c.:" And the Estate was given over. She married without his Privy: But He gave his Consent as soon as he knew of the Marriage. Lord *Hardwicke* held this a sufficient Consent to intitle Her to the Real and Personal Estate which was given Her, if She married with the Consent and Approbation of N. H. to be signified in Writing.

I mention these Cases, to shew that the Court ought not to make Strides in *Favour* of a Forfeiture.

There can be *but One* true legal Construction of these Conditions: and therefore it must be the *same* in the Court of *Chancery*, and *all the other Courts of Westminster-Hall*.

The Meaning of the Testator, or the Control which the Law puts upon his Meaning, cannot vary; in what Court soever the Question chances to be determined.

In the present Case, the Forfeiture is so cruel as to begin with the *innocent Issue* of the Offender, who is to have it for his own Life, at all Events.

This Testator considered Money as the only Qualification of a Wife: But He still means to leave it to the *Judgment of the Trustees*, "whether there might not be *some Equivalent* for "Money:" He only meant to require *their Sanction*, in Case his Son married a Woman *without* a competent Fortune.

This is undoubtedly a Condition precedent: It must have been performed before the Son could take; before his Interest could vest.

The Construction must be, to vest the Estate, "in Case his "Son married a Woman with a competent Fortune, or had the "Consent and Approbation of his Trustees to marry a Woman "without one:" The Blunder is in the *Penning* only. The Meaning is — "that in *either* Event, it shall *vest*". The Performance of *either Part* of the Alternative vests the Estate.

Here is no Objection to the Marriage. And One of the Trustees is become One of the Devisees over. Therefore a *Cause* of

of Objection ought to be *shewn*: Otherwise it shall be considered as if His Consent was with-holden without Reason.

The Consequence is, that the Judgment must be *against* Mr. Gould's Client.

The THREE Other JUDGES concurred in thinking it to have been the Intention of the Testator, that his Son's complying with *either* Part of the Alternative should be a Performance of the Condition; and that he did not incur a Forfeiture, unless he had broken *both* Parts of it. And they ALL agreed, That All Conditions in Restraint of Marriage ought to be construed with the utmost Rigor and Strictness.

Per CUR'. unanimously—

POSTEA to be delivered to the DEFENDANT.

Morris, Esq. *versus* Miller, Esq.

THIS was an Action for Criminal Conversation with the Plaintiff's Wife. The Cause came on to be tried on the 24th of *February* last: when it was not thought necessary to have a Special Verdict found; but it was agreed that a Verdict should be found for the Plaintiff, with 500*l.* Damages; subject to the Opinion of this Court, upon the following Question—

“ Whether, to support an Action for a Criminal Conversation, there must not be Proof of an *actual* Marriage?”

The FACT was, They were married at *May-Fair* Chapel.

* The Register or Books could not be admitted in Evidence. * V. 26 G. 2. *Keith*, who married them, was transported: and the Clerk, who ^{c. 33. § 14,} was present, was dead. So that the Plaintiff could not prove the ^{5.} actual Marriage, by any Evidence.

On the first Day of this Term, Mr. Serjeant *Davy*, on Behalf of the Defendant, moved for Leave to enter up Judgment as in Case of a Non-suit; in Order to have the Opinion of the Court, upon the Question reserved at the Trial.

His Objection was, “ That the Verdict was found for the Plaintiff, without sufficient *Evidence* of the Plaintiff's *Marriage*.”

A Rule was accordingly granted, for the Plaintiff to shew Cause why the Verdict should not be set aside, and a Judgment of Non-suit entered for the Defendant.

Lord MANSFIELD observed that This was the best Method to put it into: For there was no Need of a *Special Case*, upon such a Question as this.

Yesterday, (*Monday 18th May 1767*.) it was argued by Sir *Fletcher Norton* and Mr. *Stowe*, for the Plaintiff; and by Mr. Serjeant *Davy* and Mr. *Wallace*, for the Defendant.

The COUNSEL for the Plaintiff insisted that the Evidence was *admissible*: And the Jury had believed it.

We proved Articles between the Man and his Wife, made after Marriage, for the settling of the Wife's Estate, with the Privity of Relations on both Sides. We proved *Cobabitation*, *Name*, and *Reception* of Her by every Body as his *Wife*; though We did not indeed prove it by any Register, or by Witnesses who were present at the Marriage.

In Ejectment, five Months ago, before Lord *Mansfield*, this Sort of Evidence was offered and received.

Lord MANSFIELD—It certainly may be done so, in all Cases, except *Two*: One is in Prosecutions for Bigamy; and this Case (if such Proof cannot be here received) is the Other.

Sir *Fletcher Norton*—The Defendant *Miller* confessed to the Landlord of the Lodgings, “That She was Captain *Morris*’s “Wife, and that He had committed Adultery with Her.” And *Confession* is the *strongest* Evidence, even of the highest Crimes. So that this Confession is a *Proof* of an *actual* Marriage. But, in the present Case, it was *not* necessary to prove strictly an *actual* Marriage.

The Plaintiff’s Counsel therefore prayed, that the Rule might be discharged, and the Verdict stand.

The COUNSEL for the Defendant objected to the *Admissibility*, of the Evidence of a *reputed* Marriage only, as they termed it. Their Objection consisted of two Parts: (1st.) It does not come up to the Rule “of being the *best* Evidence in the Plaintiff’s “Power;” (2dly.) It is only an *Inference* of Marriage, a mere *Reputation* of Marriage.

The Confession can not be extended beyond a Confession of it’s being a Marriage in *Reputation*: The Defendant knew Nothing of any Marriage in *Fact*.

Sir *Fletcher Norton*, in Reply, said that *Confession* is *better* than Proof by *Witnesses*: It renders such Proof unnecessary. *Confession* would be good Evidence on a Prosecution for *Bigamy*. Therefore it is the best Evidence in the Plaintiff's Power. A Confession without Restriction or Limitation must be taken in the strongest Light *against* the Party making it.

LORD MANSFIELD—I do not, at present, remember any Action for Criminal Conversation, where an *actual* Marriage was *not* proved. Proof of *actual* Marriage is always used and understood in Opposition to Proof by Cohabitation, Reputation, and other Circumstances from which a Marriage may be *inferred*.

We will tell you our Opinion, To-Morrow.

CUR' *advizare vult*.

Lord MANSFIELD now delivered the Opinion of the Court.

WE are ALL clearly of Opinion, that in this Kind of Action, an Action for Criminal Conversation with the Plaintiff's Wife, there must be Evidence of a Marriage *in Fact*: Acknowledgment, Cohabitation, and Reputation, are *not sufficient* to maintain this Action.

But We do not at present define *what* may or may not be Evidence of a Marriage in Fact.

This is a Sort of Criminal Action: There is no other Way of punishing this Crime, at *Common Law*.

It shall not depend upon the mere Reputation of a Marriage, which arises from the Conduct, or Declarations, of the Plaintiff Himself.

In Prosecutions for Bigamy, a Marriage in Fact must be proved.

No Inconvenience can happen by *this* Determination: But Inconvenience might arise from a *contrary* Determination; which might render Persons liable to Actions founded upon Evidence made by the Persons Themselves who should bring the Action.

JUDGMENT of NONSUIT.

Pitt

Pitt *versus* Yalden.

MR. Serjeant *Nares* and Mr. *Dunning* shewed Cause, Yesterday, “why the *Attorney* for the Plaintiff should not pay “*the Debt and Costs* ;” for not having declared against the Defendant *within two Terms* ; by the Omission whereof the Defendant obtained his Discharge. They disputed the Meaning of the Rule * made in *Tr. 2 G. 1. 1716* ; and also the Attorney’s being charged with the Debt in this summary Way : It ought, at least, to be left to a Jury, to judge of the *Quantum* of the Damage the Plaintiff may have sustained.

* This Rule may be seen ante, p. 1449.

Sir *Fletcher Norton* and Mr. *Selwyn*, *contra*, for the Plaintiff.

The Point of Law, they said, is fully settled, “That the Term “in which the Arrest was made, is to be considered as One of “the two Terms.” For which, they cited *Pullen versus White*, which Case is reported *ante*, Vol. 3. p. 1448. They also cited a Case of *Russel versus Stewart*, in *C. B.* lately ; where, in an Action against Mr. *Palmer*, Attorney for the Plaintiff *Russel*, a Verdict with 500*l.* Damages was given against *Palmer*, for his Ignorance of or mistaking this very Rule †. Therefore they argued, that no Attorney can now defend Himself under Ignorance of it, or mistaking the Meaning of it : For All Practisers are now bound to take Notice of it ; and must answer it to their Clients, if they neglect it.

† See this Case reported, ante, p. 1787, 1788. [Note. I have there reported the Damages given to have

been *fifteen* hundred Pounds : But they were only *five*.]

And the Remedy may be had by their Clients against them, either in a summary Way ; or by Way of Reference to the Master, “to see what Damage the Plaintiff has suffered ;” or it may be sought by an Action, if the Plaintiff chooses that Method.

Note. It was said, that in *Palmer’s* Case, the Lord Chief Justice of the Common Pleas, on the first Trial, directed the Jury to find the *Whole* in Damages : But He was afterwards satisfied that He *should have left* the *Quantum* of the Damages to the Jury. And upon this Mis-direction, a New Trial was granted : And on the New Trial, the Jury gave 500*l.* Damages, only ; and this, upon the Foot of a *crassa Negligentia* ‡.

‡ See this cited Case

more particularly stated, at the End of the present Case.

Lord MANSFIELD—That Part of the Profession which is carried on by Attornies is liberal and reputable, as well as useful to the Public, when they conduct themselves with Honour and Integrity: And They ought to be protected, where They act to the best of their Skill and Knowledge. But every Man is liable to Error: And I should be very sorry that it should be taken for granted, that an Attorney is answerable for *every* Error or Mistake, and to be punished for it by being charged with the Debt which he was employed to recover for his Client from the Person who stands indebted to Him.

A Counsel may mistake, as well as an Attorney. Yet no One will say that a Counsel who has been mistaken shall be charged with the Debt. The Counsel indeed is honorary in his Advice, and does not *demand* a Fee: The Attorney may *demand* a Compensation. But neither of them ought to be charged with the Debt for a Mistake.

Not only Counsel, but Judges may differ, or doubt, or take Time to consider. Therefore an Attorney ought not to be liable, in Cases of reasonable Doubt.

I own, I was alarmed at the Verdict against *Palmer*. That Case was before Me at Chambers; where it was insisted that the Reason of not charging the Defendant in Execution, was upon Account of a Compromise depending. I referred them to the Court; and the Court thought there was no Compromise depending. They had no Doubt upon the Construction of the Rule.

Lord Chief Justice *Wilmot* told Me, after the second Trial, (if I remember right,) that his Opinion was, at first, with the Defendant: But that it afterwards came out, upon the Defendant's own Evidence, (and the Verdict went upon that Foot,) "that it was *lata Culpa*, or *crassa Negligentia*, in *Palmer* the Attorney; and that there appeared to be in Reality *no Ground* for the Pretence of a Compromise;" (which had been made Part of Mr. *Palmer*'s Excuse and Defence.)

Here, I think it is not a *clear* Case enough for the Court to proceed in a summary Way. In *some* Cases, the Court may certainly do so: But in *this* Case, the Plaintiff ought to be left to his *Action*.

The Attornies * are far from having been guilty of any gross Misbehaviour. It does not appear to Me, that They were grossly negligent, or grossly ignorant, or intentionally blamable: They were Country-Attornies; and might not, and probably did not

* There were two Partners: (Mr. Wick and another)

know, that this Point was settled here above. The Words of
 * 4 & 5 W. & the Act * are not so explicit as to direct them clearly : And they
 M. c. 21. § 2. might act innocently.

Therefore We ought not to proceed against them in a *summary* Way.

Mr. Justice YATES—The Practice upon the Rule of
Trin. 1716, 2 G. 1. is settled, “ that the Term in which the
 “ Defendant is arrested, is reckoned as *One* of the two Terms;
 “ and that if the Defendant be not charged with a Declaration
 “ before the End of the second Term, he shall be discharged
 “ out of Custody on filing Common Bail, without giving Notice
 “ to the Plaintiff or his Attorney.”

And though the Words of 4 & 5 W. & M. may favour the *Plaintiff*; yet that does not make the Rule inconsistent with the Act.

Every Court may modify its own Rules of *Practice*, if not inconsistent with the Law. And this Rule of Court is clear and plain, “ that the Defendant shall be discharged, unless he be
 “ charged with a Declaration *within* the two Terms.”

But We ought not, in that Case, to entertain an Application for a *summary* Proceeding : It ought to be left to a *Jury*, as to the *Quantum* of Damages. The *Whole* of the Debt might not be recoverable : There may be favourable Circumstances ; and these are so. The *Real* Debt is *not ascertained*, nor the *Quantum* of it.

Palmer's Case was stronger than the present. There, the Defendant was in Execution. The whole Debt there was 3000*l.* *Palmer*, the Master, was *reminded* by his Clerk, “ that He should
 “ charge the Defendant in Execution :” And there were other Circumstances. . The Expectation of a Compromise, which had been urged as an Excuse, appeared to be only a *Pretence*, when it came to be examined into.

Therefore I think this Rule ought to be discharged ; but not with Costs.

Mr. Justice ASTON and Mr. Justice HEWITT concurred in the same Opinion.

Per CUR'. unanimously—

RULE DISCHARGED, but without Costs.

Lord

Lord MANSFIELD now (on *Tuesday* the 19th) mentioned, that He had seen Lord Chief Justice *Wilmot* since Yesterday; and talked with Him about the Case of *Russell* versus *Stewart* in C. B. (*Palmer's* Case :) And Lord Chief Justice *Wilmot* told Him, That at the setting out of the Cause, He thought it very hard, and not at all reasonable, that an Attorney should be made answerable for the Debt, upon Account of a mere involuntary undesigned Mistake in a nice Point of Practice; but afterwards, upon the Examination of Mr. *Palmer's* Clerk, it appeared that Mr. *Palmer* shewed Him a Memorandum relating to a Compromise between the Parties; but the Clerk told Him "that He *must* nevertheless charge the Defendant within the Two Terms." Mr. *Palmer*, however, did *not* charge Him within the two Terms: And the Hope or Apprehension of a Compromise was pretended to have been the Cause of not doing so. (And it appeared in *this* Court too, that *Palmer* urged the Apprehension of a Compromise as an Excuse for his delaying to charge the Defendant in Execution.) But Lord Chief Justice *Wilmot* said, it appeared upon the Evidence, in the latter Part of the Course of the Cause which was tried before Him, that the Attorney for the Plaintiff had offered to Mr. *Palmer*, that if He would *declare upon his Honour* "that the Hope or Apprehension of a Compromise was *really* the *true* Cause of his neglecting to charge the Defendant within Time," the Plaintiff would be *satisfied* with such Declaration upon his Word and Honour. *This Palmer* declined. He could not, (as it must be supposed, from his rejecting so fair a Proposal,) make such a Declaration, consistently with Truth and Honour.

This Circumstance changed the Opinion of Lord Chief Justice *Wilmot*; which, before this Evidence was given, was in Favour of *Palmer*, as *not* being liable. And thereupon, He charged the Jury upon the Foot of a culpable Negligence: What I called Yesterday a *lata Culpa*, or *crassa Negligentia*. The Jury gave a Verdict for the Plaintiff, with 500*l.* Damages. And He was very well satisfied with the Verdict.

Rex *versus* Killett, Clerk.

Wednesday
20th May
1767.

A Conviction of a Clergyman, before a Justice of the Peace, upon 19 Geo. 2. c. 21. § 13. for neglecting to read the Act to prevent profane Cursing and Swearing, was quashed because the Evidence was not stated and set out, so as that the Court could judge of its Sufficiency.

It

It set forth, that on such a Day and at such a Place, *R. E.* one of the Churchwardens of *B.* came before him, and gave Information &c. The Information fully charged the Offence; specifying that the Defendant was *Parson* of the Parish, and that he *officiated as Such*, on one of the Days mentioned in the Act of Parliament and omitting and neglecting to read &c; and that the Defendant was duly summoned; but neglected to appear, or make any Defence: Whereupon, the Justice proceeded to examine into the Truth of the said Charge; *and the same, AS SET FORTH, BEING DULY PROVED* before him, as well by the Oath of the said *R. E.* as by the Oath of *G. C.* of *B.* aforesaid Farmer, a credible Witness, He adjudged the Defendant guilty, and convicted him in 5*l.*

THE COURT held, that the Evidence ought to be *set out*. They said, this was clearly so settled in *Rex versus Biffex, Trin. 1756, 29 & 30 G. 2.* in this Court. Whereas here it is only said, "the same, as set forth, being *duly proved*." *V. 10th Mod. (Lucas's Reports) 213. Queen and Green, B. R. Hil. 12 Ann.* "It ought to appear *to the Court*, from the Nature of the Evidence, *specially set forth*, that the Defendant was guilty." See also the Case of *Rex versus Vipont et al'. P. 1 G. 3. (ante, Vol. 2. p. 1165.)* So it was also settled in the Case of *Rex versus Lloyd, M. 8 G. 2. B. R.* which is reported in 2 *Stra.* 999. and was cited and relied on by Mr. Justice *Denison* in delivering the Resolution of the Court in the Case of *The King and Biffex*; where he declared, that the Case of *The King and Queen* against *Pullen and Others* (of Oath made *de Veritate Præmissorum* generally, without setting it forth specially, being sufficient in Convictions,) is *not Law now*; it having been, since that Case, quite settled "that upon a Conviction it is necessary that the Evidence should be set out, that the Court may judge whether the Justices have done right:" But upon an *Order*, it is *not* necessary; because the Court will presume that they *have* done right.

CONVICTION QUASHED.

Thursday 21
May 1767.

Saunderson *versus* Rowles.

UPON a Trial before Lord MANSFIELD at *Guildhall*, in an Action of Trover brought by a Creditor of a Victualler, claiming under a Bill of Sale made to Him by the Victualler, before the Victualler had committed any Act of Bankruptcy; against the Defendant who claimed the same Goods under the Assignment of the Commissioners, as Part of the Bankrupt's Estate and Effects; this Question arose—

I

"Whether

“ Whether a VICTUALLER who does not exceed the ordinary Course of that Occupation, but uses it just in the same Manner as other Victuallers generally do, be a *Trader* within the Idea of the *Bankrupt Laws* *, so as to be liable to a Commission of *Bankruptcy*.”

* V. 13 Eliz.
c. 7. 1 Jac. 1.
c. 15. 21 Jac.
1. c. 19. 13
& 14 C. 2.
c. 24. 5 Geo.
2. c. 30.

A Verdict was found for the Plaintiff, and 31/. Damages; subject to the Opinion of this Court.

On *Saturday* the 9th of this Month, a Motion was made by Mr. Serjeant *Davy*, on Behalf of the Defendant, for a Rule to shew Cause why the Verdict should not be set aside, and Judgment entered for the Defendant.

RULE to shew CAUSE.

Sir *Fletcher Norton* and Mr. *Mansfield*, Yesterday, shewed Cause against the Rule.

The Usage and Practice of late Years has extended Bankruptcies beyond the *Intention* of the Law. In the present Commission, this Man was called Victualler, Dealer and Chapman. If He was a Dealer, there is indeed no Doubt in the Case: But there was *no Evidence*, at the Trial, of his being Dealer or Chapman; only that He was a *Victualler*. And as such, he is not an Object of the Bankrupt Laws.

A Victualler only exercises a *Calling*, (for it can not be called a *Trade*,) by *Permission*; by a *Licence*: And the Object of his Dealing is under a *Restraint*; He is obliged to sell at the Price put upon his Goods by the Magistrates; He is obliged to receive Soldiers.

The Reasons why an Inn-keeper can not be made a Bankrupt, are laid down in the Case of *Newton* versus *Trigg*, 3 *Mod.* 329. He buys and sells under Restraint and particular Limitation. His Calling is of Necessity, and he is under the Inspection of the Public and the Power of Justices. He does not deal upon Contracts, as other Traders do. What he buys is to a particular Intent: For, 'tis to spend in his House; and though he gets his Living by it, yet he does not trade at large, *ad plurimum*. An Inn-keeper is bound to receive Guests: And 'tis chiefly upon this Account that he hath several Privileges which other Traders have not. And the Case of a *Victualler* is not distinguishable from an Inn-keeper, within the Meaning of the Acts relating to Bankrupts. Where a Man buys and sells under a Restraint and particular Limitation, though 'tis for his Livelihood, yet he is not within these Statutes.

Inn-keepers may indeed become Bankrupts, where it has been found they have had *other* Dealings; as a Vintner &c: And so likewise a Farmer may, when He becomes a *General Dealer*.

But this Man was a *mere* Victualler: His whole Effects amounted only to 100*l*. And he owed his Brewer 80*l*. He was no general Dealer; nor went beyond the Line of his Dealing as an Alehouse-keeper.

In the Case of *Meggott, Assignee of Wilson, (or Watson) versus Mills and Waine*, reported in 1 Lord Raym. 286, and in 12 Mod. 159—there was no express Decision, as appears by the last mentioned Report; because there was a Disagreement about the Facts, and therefore it was ordered to be tried again.

Mr. Serjeant *Davy* and Mr. *Dunning*, *contra*, argued in Support of the Rule; and said that Nothing was more frequent, than Commissions of Bankruptcy against Victuallers.

It has been determined that a Farmer who plants annually divers Acres of Potatoes, and buys and sells Potatoes for Gain, may be a Bankrupt. *Mayo versus Archer*, 1 Str. 513, 514. One that buys and sells Apples, Cyder, Wood or Hops, may be a Bankrupt. So may a Shoemaker; or a Taylor, who sells the Cloth as well as makes it up. So may a Tanner. So also may a Vintner, who buys and sells Wine, by Retail: Yet He deals by Licence.

LORD MANSFIELD—That has not been determined. It has been much agitated, and was solemnly argued before the Lords, who ordered a *Venire de novo*, in the Case of *Hazlewood versus Chandler*.

The Counsel for the Defendant proceeded—

The Quantity of the Effects, or the *Value* of the Thing bought and sold is immaterial.

An Inn-keeper, selling Corn *out of Doors*, may be a Bankrupt.

In the Case of *Meggott, Assignee of Wilson, versus Mills et al'*. Lord Chief Justice *Holt*, (who was not contradicted by the other three Judges) said, expressly, "That a *Victualler* may be a "Bankrupt." And this Opinion has been followed ever since. This is decisive.

A Baker,

A *Baker*, who is under the same Restraint as a Victualler, by Affize, may be a Bankrupt. And a Victualler, who sells Brandy, Wine, &c, by Retail, *out of Doors*, may therefore be so too.

LORD MANSFIELD said, there could be no Doubt but that if a Victualler deals *as a Merchant*, and sells *large Quantities* of Liquor out of Doors, he may be within the Bankrupt-Laws: But this Man sold only *small Quantities* out of Doors, *As other Victuallers do*. The Difficulty arises upon his Selling *out of Doors*. We will consider what Alteration *that* makes.

I don't lay any Stress upon the Frequency of these Commissions, where no Objections have been made to them.

CUR'. *advizare vult*.

LORD MANSFIELD now delivered the Resolution of the Court.

He stated very particularly and minutely, from his own Notes taken down at the Trial, (which He read to the Audience *verbatim*;) the exact State of the Facts as they came out upon the Evidence: Which He chose to do, that the Bar and the Students might be fully and exactly apprized of the true Circumstances whereupon the Court grounded their Opinion; and might not misapprehend Them to have determined *generally*, "That Victuallers could not in *any* Case be considered as Traders within " the Acts relating to Bankrupts."

The Facts, according to his Notes, He said, were *these*—*Shrowder* was a Publican, that is, an Alehouse-keeper or Victualler. He bought Wine, Brandy, Beer; and sold it *in* his House; and might occasionally sell them, *out of the House*, in *small Retail Quantities* by the Pot or Mug, *as all Publicans do*: And He kept an *Ordinary*. He had a *Licence* to sell Wine, and and also to sell Brandy and other Spirituous Liquors. His Lordship said, He found (upon looking over his Notes,) that He had not added the Words "*and not otherwise*"—as He thought He had: But He looked upon what He had taken down to be *tantamount*, and the same in Effect. He had taken down the Question thus—"Whether He is a Trader within the Statutes " relating to Bankrupts." If He is, the Verdict is to be for the Defendant: If he is not, the Verdict is to be for the Plaintiff, with 3*l*. *Damages*. The Question therefore referred to the Consideration of the Court is, "Whether a Victualler who " sells Liquors *in* his House, and only sells them *out of the* " House

“ House in *small* Retail Quantities as every Publican does, is an
“ Object of the Bankrupt Laws.”

So that it is here reduced to the very same Case as that of an
Inn-keeper.

* V. Crisp v. Pratt, Cro. Car. 549. Sir William Jones, 437. S. C. March 34. And it has been solemnly determined, more than once*,
“ That an *Inn-keeper* is not, as Such, (*quatenus* Inn-keeper,) “ within those Laws.”
S. C. Newton v. Trigg, 3 Mod. 329. and 1 Salk. 109. S. C. 3 Lev. 309. S. C.

The *Analogy* between the two Cases of an *Inn-keeper* and a
Viſtualler is ſo ſtrong that it can not be got over.

And We are All clear, that this Man is *not within* theſe Laws;
upon the Authority of the determined Caſe of an Inn-keeper,
and alſo upon the *Reason* of the Thing. He makes no particular
Contract, like a Trader. He can not be ſaid to get his Living
by buying and ſelling, as a Trader does. He buys, only to
ſpend in his Houſe: And when He utters it again, it is attended
with many Circumſtances additional to the mere ſelling Price.
He can not be conſidered as a Trader at large.

The only Authority againſt this, is the *Dictum* of Lord Chief
Juſtice Holt, “ That though an Inn-keeper cannot be a Bankrupt,
“ yet a *Viſtualler* may;” reported in 1 Ld. Raym. 287. and 12 Mod.
159. in the Caſe of *Meggott, Assignee of Wilson, verſus Mills and*
Another. But that is an *obiter* ſaying only; and not a Reſolu-
tion or Determination of the Court, or a direct ſolemn Opinion
of the great Judge from whom it dropped.

This *Dictum* of Lord Chief Juſtice Holt’s is no formed deci-
ſive Reſolution; no Adjudication; no profeſſed or deliberate De-
termination. That Caſe was in the Year 1697: And Lord Ray-
mond was then a young Man. But it is impoſſible for any Man
to take down in a perfect and correct Manner, every *obiter* Say-
ing that may happen to fall from a Judge, in a long or compli-
cated Delivery of his Opinion and the Reaſons of it.

However, even *this* Authority is croſſed by the Caſe of *New-
ton verſus Trigg*; reported in 3 Mod. 327. 1 Show. 96, 268.
3 Lev. 309. Carth. 147. Comb. 181. and 1 Salk. 109.

Therefore this mere *obiter* Opinion ought not to weigh againſt
the ſettled direct Authority of the Caſes which have been delibe-
rately and upon Argument determined the other Way.

As to a *Licence*—There is no Stress to be laid on *that*: It is only a Mode of laying on a Duty.

This Dealing of a Victualler, in the *ordinary* Course of his Business, is not such a Contract as is made amongst Merchants and Shop-keepers or other Dealers, in the ordinary Course of *Trade and Commerce*.

The Inconvenience would be very great, if these Persons were liable to Commissions of Bankruptcy. It would be very mischievous that Commissions should be taken out, at 70*l.* or 80*l.* Expence, in every Case where a Victualler should be unable to pay his Debts. His whole Effects might scarce suffice to answer the Expence of the Commission.

WE are ALL clear, that this Man, upon the Facts which I have particularly stated, is *not* an Object of the Bankrupt-Laws. And in Consequence of this Opinion of the Court, the Verdict is to stand: Which was a

VERDICT for the PLAINTIFF, with 31*l.* Damages.

Faikney *versus* Reynous and Another.

Friday 22d
May 1767.

THIS was an Action of Debt upon a Bond. The Defendants prayed Oyer of the Condition; and then pleaded the Act of Parliament of 7 G. 2. c. 8. (“An Act to prevent the “infamous Practice of Stock-Jobbing;”) and that the Plaintiff and *Richardson* were jointly concerned in certain Contracts &c. That the Plaintiff, contrary to the Statute, voluntarily gave to divers Persons large Sums of Money &c, amounting to the Sum of 3000*l.* for compounding and making up Differences for the not delivering Stock &c, and for not performing Contracts &c, (following the Word of the Act of Parliament:) And that this Bond was given by the Defendants to the Plaintiff for securing the *epayment* of 1500*l.* (being the Moiety of the said Sum of 3000*l.*) to the Plaintiff, by the said *Richardson* *.

* *Qu.* Whether
Richardson
was not a Co-
the Pleadings.]

Obligee with Reynous, and also a Co-Defendant in this Cause. [I never saw

To this Plea the Plaintiff demurred: And the Defendant joined in Demurrer.

Mr. *Wallace*, for the Plaintiff, argued that this Plea was a bad One, and *no Defence* against this Bond.

The Defendant insists, that the Bond is *void*, as being entered into for securing the Repayment of Money paid *illegally* and *contrary to this Act* of Parliament.

The Question arises upon § 5. of that Act, which is calculated for preventing the Compounding or making up *Differences* for Stocks or other public Securities; without specifically executing the Contract, and actually delivering the Stock &c. The Offence constituted by this Act, is the Compounding Differences, instead of actual Performance of the Contract: And a Penalty or Forfeiture of 100*l.* is inflicted upon the Offender.

But this *Bond* is not within the Clause. It is, at most, a voluntary Bond, given for Reimbursing the Plaintiff the Moiety of a Sum of Money which the Plaintiff had paid on Account of *Richardson* and Himself. It is for the Payment of Money only. No illegal Consideration appears upon the *Face* of it: And Nothing *dehors* can be received. The Matter objected by the Defendant can not be received by the Court, as *invalidating the Bond*; because it neither appears upon the Record, nor is in itself criminal at Common Law: And the Statute not having declared such a Bond void, the Court will not attend to this Averment, because this was not any Offence till this Act of Parliament made it One. *Noy. 72. Gregory versus Olden.* In Debt upon an Obligation, It was said "that it was made upon a Simoniackal Contract; and so it was for Simony." All that was averred to be Matter *dehors*, and not appeared within the Deed. And *for that*, the Plaintiff had Judgment: For, no such Averment is given by the Statute.

Mr. Cox, *contra*, on Behalf of the Defendant, argued, that the Money was paid by *Faikney* the Plaintiff, contrary to Law: And this Bond given to secure the Repayment of half of it to Him, was in its Nature void.

If *Faikney*, instead of *paying* the 3000*l.* had only given a Bond for that Sum to those he had contracted with; such Bond would have been void. And this Bond for securing to *Faikney* the Repayment of *Richardson's* Half of that Sum, was (as Mr. Cox argued) tantamount to it, and equally void. And he compared this Bond given to *Faikney*, for Repayment of Money illegally paid by him, to the Case of a Bond given by a third Person for Repayment of Money given to compound a Felony.

He observed, that by the first Section of this Act, *Faikney* might recover back the whole 3000*l.* from the Persons to whom
he

he had paid it: In which Event, he would even be a Gainer of 1500 *l.* if he could also recover so much upon the present Bond, and thereby be *twice* paid.

If two Partners in Smuggling should be to pay Money upon an illegal Consideration; and One of them should pay the Whole, and take a Bond from the Other for Half; such Bond, he said, would be void.

So, if the Money secured by the Bond was advanced and paid in any Criminal Transaction.

And He mentioned a Case in the Exchequer, a few Years ago; where the Court would not relieve, in a Contract between two Highway-Men: For, the whole Transaction was founded on a Criminal Offence.

So here, *Faikney* and *Richardson* were Partners in all these Contracts: And both Partners were culpable. *Faikney* was the Principal: *Richardson*, only a Partner. The Plaintiff (*Faikney*) was not an innocent Person; but principally criminal, and the actual Offender.

This is a mere Evasion of the Act; and would render it quite nugatory. It is totally at an End, if this Bond is not void: For, the Money would, or at least might, always be paid in this Method, if this Method should now be allowed.

As it was a Matter of great Consequence, He therefore hoped for another Argument; and said he had not had sufficient Time to prepare an Argument in Support of the Demurrer.

Mr. *Wallace*, in Reply—The imaginary Bonds which Mr. *Cox* has supposed, would *not* be void. However, *this* Bond can, at the utmost, be no more than a Bond without a legal Consideration to support it. But if it were so, it would be no more than a voluntary Bond; and would be good between the *Parties*.

This Money can never be recovered *twice*. For, the first Section of this Act gives no such Recovery to the Plaintiff, as Mr. *Cox* has surmised: It is confined to the particular Cases therein specified; *viz.* Putts, Refusals, and Wagers.

Lord MANSFIELD was clear that the Matter contained in this Plea is no *Defence* against the Action brought upon this Bond.

The

The Offence relied upon as furnishing a Ground of Defence against being liable to pay it, is *not malum in se*: 'Tis only *prohibited by this Act of Parliament*.

He mentioned a Case of One *Hales*, a Broker, (before Himself at *Nisi prius* at *Guildhall*;) where a Riscounter Contract, prohibited under a Penalty by the Stock-Jobbing Act 7 G. 2. c. 8. was held to be void; and that the Plaintiff could not recover thereupon.

But here, One of these two Persons had paid Money for the Other, and upon his Account: And He gives Him his Bond to secure the *Repayment* of it. *This* is not prohibited. He is not concerned in the Use which the Other makes of the Money: He may apply it as He thinks proper. But, certainly, this is a fair, honest Transaction *between these Two*.

If Money be lent in Order to pay a *Play-Debt*, (supposing the Lender not to have been present at the Time and Place of the Play;) or in Order to pay off an *usurious* Contract, or even to lend out upon Usury; and a Bond be given for securing the Repayment of the Money so lent; such a Bond will not be void: The Obligor will be bound to pay it. Its being *voluntary* is *not*, of itself, an Objection to his being liable to the Payment of it: It is a good Bond, unless something appears to render it otherwise.

The THREE Other JUDGES concurred, that this Bond was *not* within the Act of Parliament, nor did it appear to have been given upon any illegal Consideration; and that the Plea was no Defence against the Payment of it: And therefore that it remains a *good Bond* upon the *Face* of it, till the Obligor can *show* that it is bad.

They observed, that Paying Money to compound these Differences was not a *Malum in se*; but only stood prohibited by this Act; which neither says nor means to invalidate All Securities relating to it, (as the Act against excessive Gaming does :) It only prohibits *paying or receiving* Money for compounding Differences.

This is not a Bond for Payment of the *Composition-Money* to the Persons *Faikney* and *Richardson* had contracted with; but a Bond for *Richardson's* paying to *Faikney* a *Debt of Honour*, and *reimbursing* to *Faikney* the Money that *Faikney* had paid upon *Richardson's* Account, to compound the Differences of Contracts wherein

wherein they had been jointly concerned: And therefore it is a good Bond; and the Plaintiff ought to recover upon it.

Per CUR'. unanimously—

JUDGMENT for the PLAINTIFF.

Rex *versus* John Royce.

Monday, 25th
May 1767.

THE Defendant had been indicted for a Capital Felony as a Principal in the second Degree, at a Session of Oyer and Terminer holden before the Commissioners under a Special Commission of Oyer and Terminer and Gaol-Delivery for the City and County of the City of *Norwich*, in *December* last; for that He and divers other Persons to the Number of One Hundred Persons and more, whose Names are unknown to the Jurors, after the last Day of *July* 1715, to wit, on the 27th of *September* 6 G. 3. with Force and Arms, unlawfully riotously and tumultuously did assemble together, to the Disturbance of the Public Peace: and being so assembled together, then and there unlawfully and with Force, feloniously did begin to demolish and pull down a Dwelling-House of *Robert Marsh, Robert Harvey, Jeremiah Joes, Robert Rogers, William Offley, Samuel Wiggett, Richard Wright, Henry Kitt, Charles Marsh, Nathaniel Roe, Isaac Lillington, and John Woodrow*, situate &c, against the Peace &c, and against the Form of the * Statute in such Case made and provided. † V. 1 G. 13 Stat. 2. c. 5.

THE JURY find Him not guilty, as to all the Counts but the second: And as to the second Count, (which is the One above mentioned,) They find that the said *John Royce* and divers other Persons unknown, to the Number of One Hundred Persons and more, did at the Time and Place in the said second Count charged, with Force and Arms, unlawfully riotously and tumultuously assemble together, to the Disturbance of the Public Peace; and being so assembled, that divers of the said Persons unknown did then and there, with Force and Arms, unlawfully and with Force feloniously begin to demolish and pull down the Dwelling-House in the said second Count mentioned, in manner and form as in the said second Count is specified: And that at the Time the said Persons unknown so began to demolish the said Dwelling-House, the said *John Royce* was then and there present, and did then and there encourage and abet the said Persons unknown in beginning to demolish and pull down the said Dwelling-House, by then and there shouting and using EXPRESSIONS to INCITE the said Persons unknown so to do. But the Jury

further find, that the said *John Royce* did *not* with Force begin to demolish or pull down, *or* do any ACT *with his own HANDS or PERSON* for that Purpose, OTHERWISE *than as aforejaid*.

N. B. The Word "AIDING" was originally *infried* in this Special Verdict, but STRUCK OUT *by the Judge* (Mr. Justice *Could*,) who tried the Cause.

On *Tuesday* the 3d of *February* last, the Defendant was brought up by *Habeas Corpus*, upon this Special Verdict; when Counsel were assigned to Him, *viz.* Mr. *Cox* and Mr. *Wallace*; and the *Monday* following (9th *February*) was appointed for arguing it. In the Interim, He was committed to the Marshal.

The Indictment was founded on the Act of 1 G. 1. St. 2. c. 5. and the Question was, "Whether He was a *Principal* in the *second Degree*; and as such, ousted of Clergy by this Statute."

According to Appointment, it came on to be argued upon *Monday* the 9th of *February*, by Mr. Solicitor General (*Willes*,) *pro Rege*; and Mr. *Wallace*, for the Defendant: And many Cases were cited, (particularly the third Point of the Case of the *Siffinghurst* Riot, in *Hale's Hist. P. C. Vol. 1. p. 463.*) and many Statutes mentioned and argued from, which it would lengthen this Report too much, to specify particularly.

The very short Scope of the Argument had the following Tendency.

For the Prosecutor, it was argued that upon the present Finding, this Man is a Principal in the second Degree. *Accessaries at the Fact*, as They were anciently called, are now considered as Principals in the second Degree. Principals in the second Degree are defined in *Hales's Hist. P. C. Vol. 1. p. 437 and 615.*

But Mr. Justice *Foster* adds to this Definition, "that in Order to render a Person an Accomplice and a Principal in Felony, He must be aiding and abetting at the Fact, or ready to afford Assistance, if necessary." And this Man was abetting, and ready to afford Assistance, if necessary. The negative Part of the Finding only shews that he was not a Principal in the *first Degree*. Enough is found, to shew that he was so in the *second*: For, although *Aiders* and *Abettors* are not particularly named in this Act of Parliament; yet there is enough in it, to shew that They were meant to be included in it; and the Benefit of Clergy is taken from them by it, "the Offenders therein shall be adjudged

“ judged Felons, and shall suffer Death as in Case of Felony,
“ without Benefit of Clergy.”

For the Prisoner, it was urged—1st. That this Statute is restrained to those who *actually commit* the Felony. 2^{dly}. That this Finding does not draw the Defendant within the Description of a *principal Offender in the second Degree*: For, that All Statutes which take away Clergy ought, in *Favorem Vitæ et Privilegii Clericalis*, to be construed literally and strictly. 2 *Hale's Hist. P. C.* 335.

Now this Man did not *actually assist*: He *only* encouraged by Expressions to incite them. It does not appear, even that He was *ready* to assist them in *Act*: And it is found negatively, “ That He did *not* do any Act &c, with his *own* Hands or “ Person.”

In the Course of the Argument, a Case of one *Simms*, at *Gloucester Assizes* in 1749, upon the Black Act, for Stabbing a Mare, was mentioned by Lord *Mansfield*, and remembered by Mr. Justice *Aston*; where *Simms* held the Mare by a Handkerchief round her Neck, whilst the Other (*Merryweather*) ripped up her Belly. Both were indicted as Principals. The Case was very deliberately considered by the Twelve Judges, (though it was never *argued* before Them by Counsel;) and Eleven Judges thought the Man that held the Mare to be a Felon, and that Clergy was taken away from Him: Mr. Justice *Foster* was of a different Opinion, and continued to be so.

LORD MANSFIELD recommended to the Counsel to inquire whether They could find any Authorities or Precedents of Cases where the Word “ AIDING ” was *omitted* in a Special Verdict. He observed that “ AIDING ” does not necessarily imply that the Person *actually did* any Thing: The mere Presence may be an aiding; (as in taking a Prize at Sea.) The Number of Persons present and inciting *deters* Others from opposing; though the Persons present and inciting may not do any particular and personal Act themselves.

RULE—To bring him up on the last Day of the Term.

On that Day (12th February 1767,) being brought up accordingly—Lord MANSFIELD said, There was no Doubt but that Principals in the first and Principals in the *second Degree* were All equally *Felons without Benefit of Clergy*.

Before this Statute, they were (for this Offence) All guilty of *Misdemeanours* only; and *All equally guilty*.

The

† V. Sect. 4. The Act says ‡, “ Every such Demolishing, or Pulling down, or beginning to demolish, or pull down, shall be adjudged *Felony without Benefit of Clergy*; and the Offenders therein shall be adjudged Felons, and shall suffer Death as in Case of *Felony, without Benefit of Clergy.*”

But it leaves the *Evidence* to the *Law*: And by *Law*, they are All equally Actors.

The being Principal in the *first*, or Principal in the *second*, Degree, relates to the Priority of Trial.

So there is no Doubt on the Act, but that All are guilty, the Aiders as well as those who perpetrate the Act.

The Acts that take away Clergy turn upon another Point; *viz.* Whether they meant to distinguish the Offenders, and single out some as being under more aggravating Circumstances than Others, and deserving more Punishment than the Rest: As in Cases of Rape, Buggery, and other Common Law Offences.

• 1 Jac. 1. c. 8. So, on the Statute of Stabbing*, (upon which the Case of *The King versus Page and Harwood* was determined, in *Style* 86.) I have no Doubt but that the Intention of that Statute was to distinguish the Person who actually gave the Stab. His Case differs from the Rest, in Point of Aggravation. Therefore I am clear that the Statute so meant.

† 8 Eliz. c. 4 § 2. The Pickpocket Act † is colourable; not so strong, nor so clear as that of Stabbing: That may be liable to Doubt. “*Clam et secreta*” suppose that the Person might not be privy to the private Manner of doing it.

† V. Evans and Fynche's Case, Cro. Car. 473. upon 39 Eliz. c. 15. ¶ 24. In the Case of Robbery in a House ‡—There was great Reason for || *Powell's* and § *Hawkins's* Doubt: And the Legislature thought it necessary to make a new Act.

¶ 24. What Case or Book is here referred to. § V. Hawkins's P. C. Vol. 2. p. 355 to 357.

¶ 19 G. 1. c. 22. But in the Black-Act ¶—The Words are, “ If any Person &c shall unlawfully and maliciously kill maim or wound any Cattle &c; every Person so offending, being thereof lawfully convicted, shall be adjudged guilty of Felony, and shall suffer Death as in Cases of Felony, without Benefit of Clergy.” And yet in the before-mentioned Case of *Simms*, Mr. Justice *Foster* had a Doubt whether the Statute did not confine the Offence to the

the *Person killing*: But the other Eleven Judges held the Other to be as criminal. And that Determination was right.

Therefore there is no Doubt, if it stood upon *general Reasoning*.

But though We are All clear “that Principals in the second Degree are indictable as Principals;” yet We have great Doubt on this Special Verdict, as to the particular Finding; or, indeed, “Whether it finds any Thing material, at all.”

Therefore this Point shall be spoken to on the first Day of next Term.

The Jury can not find *Evidence*: They must find *Facts*.

In the Case of *Messenger, Green, Bedell, and Others*, in *Kelyng* *, * V. *Kelyng*. it was agreed that a Finding of *All Evidence*, and *No Fact*, was ^{78, 79.} not sufficient; that being aiding and assisting is a Matter of Fact, and ought to be expressly found by the Jury; and that a Verdict which only finds “that the Defendants were *present*,” but finds no particular Act of Force committed by them, is not full enough for the Court to judge upon.

Now I doubt whether *this* Special Verdict has found any Thing more than being *present*. I doubt whether They have found that this Man was aiding and assisting. What the Jury specially find is, “that he did then and there encourage and “ abet by *shouting* and using *Expressions* to incite; and not otherwise; not with *Force*, or by any personal *Act*.” They do not find him *ready to assist*: Nor do they use any Words to find him *aiding and assisting*; which are necessary Words to be inserted in a Verdict, to charge Offenders as Principals in the second Degree. Therefore let it be spoken to, on the first Day of next Term, upon the Question—“*WHAT is found by this Special Verdict.*”

Mr. Justice ASTON concurred.

They ought to have found him to have been aiding and assisting; or, at least, ready to assist.

Hale and *Hawkins*, and All the Writers upon the Subject, and Lord *Coke* in particular, speak of being present, aiding and assisting.

Therefore aiding and assisting ought to be expressly found. We ought not to depart from that Precision, which has been required.

Mr. Justice HEWITT—Upon Consideration, I do not find any Reason for Mr. Justice *Foster's* Distinction in the Case of *Simms*.

Those that are aiding abetting and assisting are, at *Common Law*, as much Principals as the Actors.

But where a Statute *makes* a Felony; if the Person is not guilty of the Felony so *made*, He is guilty of Nothing.

Stabbing is a personal Act: So is picking a Pocket. But I have Doubt about the Case of robbing in the House.

Perhaps the Term "Abetting" may not be sufficient, without adding "*Aiding and Assisting*."

ADJOURNED to the first Day of *Easter Term*.

Accordingly, on 6th *May* 1767, being the first Day of this present *Easter Term*, this Special Verdict was argued a second Time, by Mr. Attorney General (*De Grey*) *pro Rege*, and Mr. *Cox, pro Def.* upon the Point reserved on the last Day of last Term.

Mr. *Attorney General* argued that the Special Verdict was sufficiently expressed, to affect the Prisoner with the Crime charged upon him.

He is expressly found to have been present; and to have *encouraged and abetted*.

In 2 *Inst.* 182. Lord *Coke*, in his Comment on *Westm.* 1. c. 14. explains the Words "Command, Force, *Aide*, and Resciment:" And in speaking of the Word "*AIDE*," He says "It comprehends all Persons counselling, *abetting*, plotting, assenting, *consenting* and *encouraging* to do the Act, and who are *not present when the Act is done*; (for, if the Party commanding, furnishing with Weapon, or aiding, be present when the Act is done, then is He Principal.")

In the Case of Murder—If *A* commands *B* to beat *C*, and He beats him so that He dies thereof, it is Murder in *B*: and *A*, if present, is also guilty of the Offence. *Hale H. P. C. Vol. 1. p. 435, 440. Pulton 137. a.*

If

If any One comes for an unlawful Purpose &c; though He do not act, He is yet a Principal. 1 *H. H. P. C.* p. 374, 443. and 2 *Hawk.* 311.

LORD MANSFIELD—Your Principles are admitted. But the Question here is “Whether he did more than use *Expressions* to incite.” We are quite clear, with You, that what you mention is EVIDENCE from whence the Jury *might* have drawn Conclusions. But here, the Word “*Aiding*” is left out: Which seems to be the technical Term. And the Finding of the *Abetting* is *qualified*: For, it is found, negatively, That he did it “no other-wise than by shouting and using *Expressions* to incite.”

MR. JUSTICE HEWITT—The Objection is, That it is not expressly found “that *he did* aid or assist:” Nor is any Sort of Force shewn to have been used by Him; but the Contrary, “that he did not use Force, or *do* any Act with “his own Hands &c.”

MR. ATTORNEY—*Aiding* is not necessary, nor *assisting*. *Abetting* indeed is necessary: But *Consent* alone is sufficient in the present Case.

Here was strong Instigation, by actual Shouting and using *Expressions* to incite: And it is expressly found “that he did *encourage and abet*.”

Minsbieu, and *Cowell*, and *Skinner*, *verbo* “*abet*”—and *Spelman*, and *Du Fresne*, All shew, that *Instigation* alone, *without Force*, is the Sense of the Word “*abet*;” and that it is always taken in the *worst* Sense.

Seconds to Duellists are Principals in the second Degree, or not, according to the different Designs they come upon. 1 *Hale H. P. C.* 443, 444.

“*Nullus dicitur Felo principalis, nisi Actor, aut qui presens est abettans, aut auxilians actorem ad Feloniam faciendam.*” 3 *Inst.* 138. And *Foster* 354. says, “Persons engaged &c. will not be “involved, unless they actually aided or *abetted*.” It is the *Mind*, not the Act, that constitutes the Offence.

A Servant assisting his Master, but not privy to the Master’s Intention; if the Person, against whom He assists Him, is killed; it is Murder in the Master, because He had Malice forethought; but only Homicide in the Servant. 1 *H. H. P. C.* 437, 438.

In *Messenger's Case*, 2 St. Tr. 591—*Green* was holden not guilty; because no particular Act of Force was found against Him; nor that he was aiding or assisting the Rest. So, *Apple-tree's Case*; and *Bedell's Case*. *Ibid.* Nothing was found that sufficiently charged them.

Indeed it is necessary to find either *Force*, or something *contributing* to the Guilt. But here is the latter. This was an illegal assembly: The Defendant abetted and encouraged by Shouts and Expressions. The *Mode* of his Abetting is found: And Contributing to the Guilt is implied in the very Idea of abetting. The Result is of Course. The using *Expressions to incite* comes up to Lord *Hale's* Notion of *abetting*.

Special Verdicts need not be so nice and strict, as either Indictments or Appeals.

Mr. *Cox*, *contra*, for the Defendant. The present Case depends upon the Distinction between *Aiders*, and mere *Abettors*. In the Cases that have been cited, where the Defendants both aided *and* abetted, the Distinction was not necessary to be attended to.

This Man can not be considered as a Principal in the second Degree. This Felony is not a *Malum in se*: It was originally a Trespass; and only *made* Felony, by Act of Parliament.

In much higher Offences, (such as Stabbing,) a Person not guilty of a sufficient Proportion of Guilt shall not be a Principal in the second Degree. So, in privately stealing from the Person.

In *this Offence*, Nothing less than direct *Aiding* and *Assisting* (expressly found) can make a Man a Principal in the second Degree.

Every Thing shall be taken most favourably for the Prisoner. This is always laid down: And it is particularly so, in the Case of *Regina* versus *Whistler et al'*. 2 Ld. Raym. 842.

This Offence is little more than a Trespass. The Man *did* Nothing: It does not even appear that the Expressions of Incitation were *heard* by the Perpetrators of the Fact. They ought to have shewn that the Mischief was done in Consequence of these Expressions of Incitation.

Aiding and Assisting ought to be *expressly* found.

Abetting is only *encouraging*: It may be innocent; for it may be without Effect. Aiding, indeed, can not be innocent: But *abetting* may.

Rex versus *Page and Harwood*, *Style* 86. and *Aleyn* 43, 44. is exactly similar to this Case. The Defendants in that Case were only present, and abetting the Person that did the Fact; but used *no Action* towards the Death of the Party: And they were admitted to their Clergy.

But *this* Abetting is confined to “*Shouting* and using *Expressions* “to incite the said Persons so to do”—that is—“to shout:” For Shouting is the last Antecedent.

In the Case of *Messenger and Others*, the “*Aiding and Assisting*” were holden to be essentially requisite to be expressly found as a Fact. *Green* and *Bedell* were discharged; because they were not *expressly* found to be *aiding* and *assisting*.

Abetting is less than aiding and assisting. The latter is a Fact which ought to have been *expressly* found by the Jury, in Order to make this Man a Principal in the second Degree: And no such Fact being found against Him, he ought to be discharged.

Mr. ATTORNEY GENERAL said that as Mr. Cox had not put it upon any *new* Foot, He would not trouble the Court with a Reply.

LORD MANSFIELD—We’ll think of it, and give Notice when We are ready to give our Opinion.

CUR’. *advizare vult.*

On *Thursday* last, the 14th Instant, Lord MANSFIELD delivered the Resolution of the Court.

The Question intended to be left to the Opinion of the Court upon this Special Verdict, was—“Whether Persons present, “aiding and abetting the Others unknown, in beginning to demolish and pull down the Dwelling-House, (who are called “Principals in the second Degree) were within this Statute.”

And We were All of Us of Opinion “That they *were*:” And We are All very well satisfied that We were right in our Opinion.

But then a Question was started, “Whether the FACT of *aiding or assisting* was at all found by this Special Verdict, as it

“ is worded ;” the Words of it going no further than *encouraging and abetting*.

The Doubt arose on what is said in the Case of *Messenger, Green, Bedell, and Others*; and whether the Objections that prevailed in those Cases to the Want of Fulness and Sufficiency in the Verdict, might not prevail in this.

And a Doubt particularly arose on the Omission of expressly adding the Word “ aiding :” For, though the *Evidence* which the Jury states in the Special Verdict were admitted to be sufficient to *support* such a Finding, *if* They had gone on to *draw the Conclusion*; yet this was said to be no more than a Finding of mere Evidence, *without* drawing a Conclusion from it.

And it was said too, that even the Finding “ his being present “ encouraging and abetting by shouting and using Expressions to “ incite,” was *qualified* by the negative Finding which follows it, “ that he did not with Force begin to demolish or pull down, “ or do any Act with his own Hands or Person for that Purpose, OTHERWISE *than as aforesaid*.”

Tenderness ought always to prevail in *Criminal* Cases; so far, at least, as to take Care that a Man may not suffer *otherwise than by due Course of Law*; nor have any Hardship done him, or Severity exercised upon him, where the Construction may admit of a reasonable Doubt or Difficulty.

But *Tenderness* does not require such a Construction of Words (perhaps not absolutely and perfectly clear and express,) as would tend to render the Law nugatory and ineffectual, and destroy or evade the very End and Intention of it: Nor does it require of Us, that We should give into such nice and strained critical Objections as are contrary to the true Meaning and Spirit of it.

But however, there being a Doubt raised upon this Special Verdict, We have considered of it, and taken Time to form our Opinion and Determination upon the Validity of the Objections.

And We are All of Opinion that the Verdict *is sufficient* to find this Man a Principal in the second Degree.

Aiding is an equivocal Term: But *abetting* certainly makes him a Principal in the second Degree.

It is true, that the Word “ *aided*” is not expressly used in this Special Verdict: But it is found “ that He was present, and did “ then

“ then and there encourage and abet, by shouting and using Expressions to incite.”

The Jury have positively found the Conclusion “ that He *did* encourage and abet.” They have also found *how* He encouraged and abetted, *viz.* “ by then and there shouting and using Expressions to incite the Persons to do the Act.” But this latter Finding *can not vitiate* their former Conclusion— “ That He did then and there encourage and abet.”

It is objected, That this is NOT *the* WHOLE of what They find: For, They find further, “ That He did *no* Act with his own Hands or Person, for that Purpose, *otherwise* than as *aforesaid*.” And it is true, that They have so gone on, and added this *further* Finding.

But it is also as true, that They have found “ That He was then and there present, and *did* then and there encourage and abet the said Persons unknown, in beginning to demolish and pull down the said Dwelling-House, by then and there shouting and using Expressions to incite the said Persons unknown so to do.”

Mr. Cox very ingeniously observed, that in Point of *Grammar*, the Jury have only found him to have abetted “ by shouting and using Expressions to incite the said Persons unknown TO SHOUT:” For, that “ *Shouting*” is the *last Antecedent* to the Words “ *so to do*.”

But We are All of Opinion, that there is *really* no Colour for that Construction: It will not hold, either in Regard to the obvious and manifest Sense and *Meaning* of the Sentence and its Context, or in Point of *Grammar*.

“ So to do”—is “ to do *the* ACT:” Which Act is, two or three times over in this same Sentence, specified and described to be “ beginning to demolish and pull down a Dwelling-House.”

This Verdict We hold to be sufficient to find this Man to be a Principal in the second Degree.

The Jury have expressly found, that He *encouraged and abetted* the Offenders, in doing the Criminal Act mentioned in the Indictment: They have found *how* He encouraged and abetted them; and have specified the particular Circumstances of his doing so. And these Circumstances amount to Evidence of it:
They

They are, in Point of Law, Evidence *sufficient* to prove "That He did encourage and abet them."

Therefore there lies no Objection in Point of Form, to the Special Verdict.

He was present, encouraging and abetting Persons unknown, to the Number of One Hundred and more, with Force and Arms unlawfully riotously and tumultuously assembled together to the Disturbance of the Public Peace, in feloniously, with Force and Arms, unlawfully and with Force beginning to demolish and pull down a Dwelling-House: And therefore He is a *Principal in the second Degree*.

But it is reasonable that He should have, and therefore let him have Time to consult his Counsel "Whether there can be any Objection taken in Arrest of Judgment."

Whereupon, Mr. Cox desired He might be brought up again on that Day Se'nnight.

A RULE was made accordingly.

Being now brought to the Bar, Mr. Solicitor General (*Willes*) prayed Judgment against him.

Mr. Cox and Mr. Wallace for the Defendant, mentioned some Objections to the Record, in Arrest of Judgment.

1st. The Commission of *Gaol-Delivery*, as set out, does not shew that Mr. Justice HEWITT (before whom he was tried,) was of the *Quorum*: It does not specify Him *by Name*. In the Commission of *Oyer and Terminer*, it is stated "that He was of the *Quorum*: But the Commission of *Gaol-Delivery* does not shew it.

2d Objection. Here does not appear to have been *any Issue joined*: But immediately after the Plea of Not guilty, and *without* any Issue joined, Process is awarded. In *Mackallye's Case*, 9 Rep. 63. a. (which was at a Session of *Gaol-Delivery* at the *Old Bailey*,) Issue is joined upon the Record. [But They owned it to be the *Practice*, that Issue does not, in such Cases, use to appear upon the Record, to have been joined; nor is it the *Practice* at the *Old Bailey*.]

3d. Objection.—The Justices of *Gaol-Delivery* are only said to be "*assigned* to deliver the *Gaol*:" But it does not shew *by whom* They were assigned; neither does it say that *James Hewitt Esq.*

Esq. was *One* of Them. And yet the Statute of 27 H. 8. c. 24. § 2. requires that Justices of Gaol-Delivery shall be made under the Great Seal: And in *Hob.* 139. They are called the *King's* Justices. Here, They are neither said to be by *Letters Patent*, or to be Justices “*of our Lord the King*,” assigned: Which is the least that ought to have been said in the Description of Them.

4th Objection.—The Court can not pass a Judgment upon *this* Man; because the Record is *incomplete*: For the Jury are charged to inquire against *Three*, and Three have pleaded Not guilty; but it does not at all appear *what is become* of the *Other Two*. It ought to have appeared upon this Record, whether they were convicted or acquitted; and what has been done upon those Indictments. In *Yelv.* 106. *Drury* versus *Dennis*, in Trespass against *Baron and Feme*, for beating the Plaintiff's Mare; The Jury found “That the *Wife* beat it”—This was holden to be an imperfect Verdict; the Husband being neither acquitted nor condemned.

Mr. *Attorney* and Mr. *Solicitor General*, *contra*, answered all these Objections: But it is needless to report them; because—

THE COURT were clear there were no Grounds for any of them.

1st. It is not necessary to *set out* the Commission of Gaol-Delivery at large: It is mere Matter of Description. In the Commission of *Oyer and Terminer* it is “of Whom our said Lord the King wills that the said Sir *Henry Gould* or *James Hewitt* Esq. shall be *One*.”

2d. Joining Issue is not usual or necessary for it to appear upon the *Record*, in Cases of this Kind, at a Session of *Oyer and Terminer*. And upon a Commission of Gaol-Delivery, which is a Proceeding *Ore tenus*, and *instantèr*, no Issue is joined*. The Defendant says—“I am not guilty: Therefore let me out of Prison.” And if he is not found guilty, He is to be delivered out of Prison.

* See Rastall's Entries, Coke's Entries, Tre-
maine's Entries; particularly Tre-

maine's Entries 286, 287. *Rex v. Doughty et al'*. where the Want of joining Issue is assigned for Error (upon an Indictment at a Sessions of the Peace and *Oyer and Terminer* at Hicks's-Hall:) Yet the old Practice has continued ever since. In *Purchase's Case*, 9 Ann. at a Session of *Oyer and Terminer* at the Old Baily, it appears by the State-Trials, Vol. 8. p. 286, 287. that upon the Record, no Issue is joined: And yet no Exception was taken.

3d It sufficiently appears, upon the whole Record, that They are the *King's* Justices: And They can be assigned by Nobody but the King.

4th. There was no Need to take any Notice of the other Two. The *Certiorari* only requires the Return of the Indictment and Special Verdict as to *this* Man: The Record is complete, *as far* as the Requisition of the Writ of *Certiorari* goes. The Cases of Each are *several*. He is not charged as an *Accessory*. Then indeed, it might have been a different Case: But the Cases of *these* Defendants are *distinct* and *separate*. Therefore it was not necessary to return what was done as to the Rest; or to take any Notice of them.

WHEREUPON—

The Defendant being first asked “What he had to say why
“ Judgment should not be pronounced upon Him and Sentence
“ awarded against him;”

Mr. Justice YATES, the second Judge of the Court, (after a very proper Expostulation with the Defendant, to convince him of the Enormity of his Crime, and a very serious and pathetic Exhortation to Repentance, as he could have but small or no Hope of Mercy,)

PRONOUNCED SENTENCE of DEATH upon him.

LORD MANSFIELD then asked Mr. Attorney-General
“ what He had to pray, as to the Time and Place of
“ Execution:”

Who answered, that He had Nothing particular to pray, as to Either.

Whereupon, *per* CUR'.—

* He never
was executed;
neither was
He pardoned:
He died in the
King's Bench
Prison, in
Feb. 1771.

A RULE was made for his * Execution on this
Day Fort'night, at (the † usual Place) *St. Thomas a Watering's*, in *Surrey*.

† 'Tis in
1 *Str.* 553.

† N. B. He was in Custody of the *Marshal* of this Court: *In which Case*, this is the *usual* Place of Execution. See the ‡ Case of the two *Atboes*, (Father and Son,) *P.* 9 *G.* 1. Who were executed there; though it is said, in a Book commonly called *8 Mod.* (p. 146.) “that they were executed at the *common* Gallows in the County of “ *Surrey*.”

Rex *versus* Mayor and Aldermen of Leicester.Wednesday
27th May
1767.

UPON a Mandamus to restore One *James Sismey* to the Office of an Alderman of the Borough of *Leicester*.

The Defendants returned for Cause of Removal—That the said *James Sismey*, after He was elected placed and sworn into the said Office, and before Amotion of Him from it, that is to say, on the 1st of May 1766, DEPARTED, *with his Family, from the Borough of Leicester aforesaid and the Liberties thereof, and ENTIRELY left the same, with an INTENT to reside inhabit and dwell, with his Family, for the future, elsewhere;* and from thence, and until and at the Time of the Amotion of Him, *did continually abide reside inhabit and dwell, with his Family, out of the said Borough and the Liberties thereof, contrary to the Duty of his Office aforesaid, To the great Injury and Damage of the Mayor Bailiffs and Burgeesses of the said Borough.*

They then return, That *on the 10th of September 1766, Joseph Chambers*, then Mayor of the said Borough, and the major Part of the Aldermen of the said Borough for the Time being, *in DUE Manner* met and assembled at the *Guild-Hall* of and within the said Borough, *concerning divers Matters and Businesses relating to the said Borough and the good Regulation and Government thereof:* Of and to which said Meeting or Assembly, *due and reasonable Notice and Summons* was previously sent to *All the Aldermen of the said Borough for the Time being, resident or being within the said Borough and the Liberties thereof, in Order that They might attend at the said Meeting or Assembly.*

They further return, That *at the said Meeting or Assembly, a Charge and Information* was made and given to the said Mayor and Aldermen so assembled, against the said *James Sismey*, “ of
“ his having *departed from and left the said Borough and the Liberties thereof as aforesaid, and of his abiding residing and dwelling OUT OF the said Borough and the Liberties thereof as aforesaid, contrary to the Duty of his said Office, and to the great Damage of the said Mayor Bailiffs and Burgeesses of the said Borough,*” *as a reasonable Cause for the Removal of the said James Sismey from his said Office.*

WHEREUPON the Mayor, and major Part of the Aldermen of the said Borough so then and there assembled as aforesaid, did then and there *duly discharge and remove Him the said James Sismey from the said Place or Office of One of the Aldermen of*
the

the said Borough, FOR THE CAUSE AFORESAID: And by Reason thereof, He hath ever since remained, and still is and continues removed and discharged therefrom. And thereupon They can not restore Him &c, as by the Writ They are commanded.

Mr. *Wa'ker*, for the Prosecutor, objected to this Return, as being insufficient.

1st. The Corporate Meeting is only returned to be assembled "upon *due* Notice:" Whereas there ought to have been *particular* Notice; as it was not upon a Charter-Day.

2d. No Notice was given to the *Person removed* of any Charge upon Him.

3d. *Non constat* that the Corporate Body *heard* the Charge, or determined upon it; or that it was determined at all.

4th. Consequently, the Amotion of this Gentleman was irregular.

5th. *No Neglect of Duty* is charged; only that He absented Himself from the Borough.

Mr. *Hill*, *contra*, for the Corporation.

* Only from
1st May to
10th September.

1st. It is stated particularly, that He and his Family *totally* left the Borough without Intention to return; and had been so absent, above a Year*. This is a good Cause of Amotion. It is expressly stated "That *All* the Corporation (the Mayor and "Aldermen) had Notice of a Corporate Meeting *to do the Business of the Corporation.*" It is not necessary to *specify* the *particular* Business to be done. It would be extremely inconvenient, if it were holden necessary that every Corporator must have particular specific Notice of *every single Business* that might occur: A Notice to each Member, "to meet *to do the Business* of the "Corporation," is sufficient. Mr. Justice *Eyre's* Opinion is so, in the Case of *Rex versus Corporation of Carlisle* [See 1 *Strange* 385:] And it was not contradicted by the Rest of the Court.

2d. *Regina versus Truebody*, 2 *Ld. Raym.* 1275. is in Point—that if a capital Burgeis leaves the Borough *totally*, there is *no* Need of *Notice to Him*.

5th. In the Case of *Vaughan versus Lewis*, *Carthew* 227. *Holt* Chief Justice held that the not inhabiting within the Borough is a good Cause of Amoval. *The City of Exeter versus Glide*,
4 *Mod.*

4 Mod. 33. *Holt's Rep.* 169. and 12 Mod. 27. S. C. [See also *Rex versus Mayor &c of Newcastle*, (Mr. *Fetherstonbaugh's* Case,) Hil. 1746, and *Mich.* 1747. 21 G. 2. B. R.]

LORD MANSFIELD—This Man had NOT *totally* left the Borough. There is no Pretence to support this Return: He was only absent about *four Months*.

Mr. Justice YATES concurred. The Case just now cited out of Lord *Raymond* is in Point *against* the Return*. How can the Corporation know his *Intention*? How did They *know* “that He did not intend to return?” He might have altered his Intention.

* The Words are—“Other-
“ wife, if he
“ only left
“ the Bur-
“ rough a
“ While, for
“ his Health's
“ Sake &c.”

LORD MANSFIELD—But They have *never asked* Him: They have given Him *no Notice* of the Charge. There is no Pretence for amoving Him.

Per CUR'.

RETURN disallowed: And a PEREMPTORY
MANDAMUS ordered.

RESTORATION-DAY: Only One Judge came down. It is Friday 29th not usual that any Business is done upon this Anniversary. May 1767.

But this being the *last Common Paper-Day*, the One Judge went through the Paper: Otherwise, the Parties could not have had their Judgments within this Term.

Rex versus William Davis Phillips Esq. Mayor of Plymouth. of Saturday 30th May 1767.

MR. *Attorney General* (*De Grey*) moved for a Rule to be made upon the Defendant, to shew Cause why an Information should not be granted against Him, “for certain Misdemeanours in his Office as a Justice of Peace of and for the Borough of *Plymouth*, and for the illegal and false Imprisonment of *Hugh Smart*, *William Puckey*, and *George Lemon*, being Officers of His Majesty's Customs, and in the due Execution and Discharge of their Office.” (These were the Words of the Notice of Motion given to the Justice.)

After Mr. *Attorney General* had opened the Case—

Lord MANSFIELD asked Him, "On whose *Behalf* He moved this."

Mr. *Attorney* declared that He moved it on *Behalf* of the CROWN.

Whereupon—

Lord MANSFIELD rejected the Motion; declaring that He would never grant a Motion for an Information applied for *by the Attorney General* on Behalf of the CROWN: because the Attorney General has Himself Power to grant it, if He judges it to be a proper Case for an Information; and it would be a strange Thing for the Court to direct *the'r Officer* to sign an Information which the Attorney General might sign *Himself*, if He thought proper: And if He did not think it a proper Case, it would equally be a Reason why the Court should not intermeddle. If the Attorney General should have any Doubt about the Propriety of it, He might send to the Magistrate complained against, to shew Him Cause why He should *not* grant it.

* V. ante,
p. 1565.

He said, that He had rejected such a Motion two or three Times, since He came into this Court: It was once denied to Sir *Fletcher Norton*, when He was Attorney General*; and once, before that; and He would never grant it, because it was the proper Province of the King's Attorney General to do it Himself, instead of applying to this Court for their Leave to do it.

Mr. *De Grey* said, It was out of *Respect* to the Court, that the Application was made to the Court, instead of using his own Power of doing it Himself.

Lord MANSFIELD—If it appears to the King's Attorney General to be right to grant an Information, He may do it Himself: If He does not think it so, He can not expect Us to do it.

MOTION DENIED.

Rex *versus* The Inhabitants of Harrow.

THIS was an Indictment for not repairing a Highway.

The INDICTMENT sets forth, That from Time to Time whereof the Memory of Man is not to the Contrary, there was
and

and yet is a certain ancient and common King's Highway leading FROM the HAMLET of *Roxeth* in the Parish of *Harrow* in the County of *Middlesex*, towards and unto the ancient Market-Town of *Brentford* in the County aforesaid, used for the liege Subjects of our said Lord the King and his Predecessors, with their Horses Coaches Carts and Carriages, to go return pass ride and labour at their Will and Pleasure; and that a CERTAIN PART of the said King's Highway, situate lying and being IN THE PARISH OF HARROW AFORESAID in the said County of *Middlesex*, leading from *Roxeth-Place House* IN the said HAMLET of *Roxeth*, unto a certain Place called the *Stroud-Gate* in the same Hamlet, in the said Parish of *Harrow*, containing in Length Forty Poles and in Breadth Eighteen Feet, on the 29th Day of *November* in the sixth Year of the Reign of our Sovereign Lord *George* the Third now King of *Great Britain* and so forth, and continually from thence until the Day of the taking this Inquisition, at the Parish of *Harrow* aforesaid was and yet is very ruinous miry deep and in such Decay, for Want of due Reparation and Amendment of the same, so that the liege Subjects of our said Lord the King could not during the Time aforesaid nor yet can there go return pass ride and labour with their Horses Coaches Carts and Carriages, as they used and still ought to do, without great Danger of their Lives and Loss of their Goods; to the great Damage and common Nuisance of all the liege Subjects of our said Lord the King through the same Way going returning passing riding and labouring, and against the the Peace of our said Lord the King his Crown and Dignity: And that the Inhabitants of the said Parish of *Harrow* the Common Highway aforesaid, being in Decay and out of Repair, of Right ought to repair and amend, when and so often as it shall be necessary.

On *Monday* the 11th of this Month of *May* 1767, a Motion was made, on Behalf of the Defendants, in arrest of Judgment: And a Rule to shew Cause.

The Objections were—1st. That it is laid as a King's Highway leading from a HAMLET: But a Hamlet is less than a Vill, or Town. It ought to be laid as leading from one TOWN to Another. *Palm.* 389. *Bole's Case*, and 1 *Hawk.* P. C. c. 76. p. 201. § 1.

2d Objection. This is an Indictment for not repairing a Road leading FROM the *Hamlet* of *Roxeth* to the Town of *Brentford*: Yet it describes the defective Part as being Part of a Road leading from *Roxeth Place House* IN the Hamlet of *Roxeth*, to the Town of *Brentford*. Therefore the Hamlet itself is excluded, by the former Expression of "leading from it:" But the latter Description

* N. B. P. 7⁸ is misprinted for 81. scription includes it, or, at least, *Part* of it. 2 Ro. * *Abr.* Title Indictment, Letter M. *pl.* 19. is in Point, as they said.

THE COURT over-ruled the Objections.

They held it sufficiently described by saying "that it led from a Hamlet:" And they saw no Inconsistency in the Description of the Part out of Repair.

It was observed that the *Place out of Repair* is *not* described to be IN the Hamlet. The Objection proceeds wholly upon a Mistake. The Indictment does not say "that the PART of the Way which is *out of Repair* is IN the Hamlet of *Roxeth*:" It says that it is "*in the Parish of Harrow.*" The Place where they *take up* the Road from its Beginning, is indeed described to be *in* the Hamlet; and so is the Place where they *leave* it: But it may go *through* other Parts and Places which are *not* within the Hamlet. It does not follow, that because the Beginning is in the Hamlet, and the End in the Hamlet, therefore no intermediate Part of it can be *out* of the Hamlet.

The Hamlet of *Roxeth* is *excluded*, even upon the very Principles insisted on by the Counsel for the Defendants. For, the Words *from Roxeth-Place House to Stroud-Gate*, which are Both of them in the Hamlet, *exclude both* those Places; and, consequently, exclude the Hamlet in which they are situated. So that here is no Inconsistency or Repugnancy upon the Face of the Record.

Per CUR'. unanimously—

RULE DISCHARGED.

Monday 1st
June 1767.

Beckwith Esq. *versus* Shordike and Hatch.

THIS was an Action of Trespass for entering the Plaintiff's Close, with Guns and Dogs; and killing the Plaintiff's Deer. The Defendants pleaded "Not guilty:" And a Verdict was found for the Plaintiff, with 30 s. Damages.

A Motion had been made, on Behalf of the Defendants, for a New Trial; as the Judge who tried the Cause (Mr. Baron *Adams*) was of Opinion that the Jury ought *not* to have found the Defendants guilty; it being an *Accident* that happened *without* their Intention, and *contrary* to their Inclination.

Upon

Upon shewing Cause against a New Trial, Mr. Serjeant *Whitaker* argued on Behalf of the Plaintiff; and Sir *Fletcher Norton*, on Behalf of the Defendants.

Upon the Baron's Report of the Trial and Evidence, so far as it related to a New Trial, it did not appear that the Baron had *directed* the Jury to find for the Defendants; though it was his *Opinion* "that They should have done so."

THE COURT thought that in Cases of this Nature, it must depend very much upon the *particular Circumstances* appearing in Evidence, "Whether the Persons who owned the Dogs "which, *in their Company*, did the Mischief, were or were not "Trespassers." In the present Case, the two Defendants entered, with Guns and Dogs, into a Close of the Plaintiff's adjoining to his Paddock: And their Dog pulled down and killed One of the Plaintiff's Deer. They have pleaded "Not guilty," to the Trespass: And upon *this Plea* of "Not guilty," this was *sufficient* Evidence to prove them Trespassers. They were not going along a Foot-Path; and their Dog happened to escape from them, and run into the Paddock and pulled down the Deer against their Will, (which Sir *Fletcher Norton* had represented the Fact to have been;) nor was it another Person's Dog, that followed them by Chance, (which had been also represented to have been the Fact; though neither of these Representations were verified by the Judge's Report:) But it was their *own* Dog; and They having these Dogs and Guns with them, were in the Plaintiff's Close, and *not* in a Foot-Path. The Jury therefore, who were to judge "*quo animo* They entered the Plaintiff's Close," considered it as an *intentional Trespass*, and not as a mere involuntary Accident: And the Judge, though He might *think* otherwise, *did not direct* them which Way to find their Verdict; but left it to Them.

Lord MANSFIELD added, that the Damages were so small, that it was not worth While to set the Verdict aside upon Payment of Costs, and put the Parties to the Expence of a New Trial: The Play would not be worth the Candle.

Mr. Justice YATES answered an Objection of Sir *Fletcher Norton's*, "That the proper Action would have been for keeping a Dog *used* to bite and run down Deer &c;" by saying, that it might not have been in the Plaintiff's *Power to prove that*: It might probably be a Dog that the Plaintiff was an entire Stranger to. The Dog belonged to the *Defendants*: And it would be too hard to put this Proof of his ill Qualities upon the *Plaintiff*.

Mr. Justice ASTON mentioned a Case apposite to this Subject; as it turned upon the Distinction between *voluntary* and *involuntary* Trespases. It is reported in the Additions to Lord Chief Justice Popham's Reports: It is in page 161. *Millen* versus *Fandrye*—The Defendant, with a little Dog, chased the Plaintiff's Sheep out of his Ground (where they were trespassing;) and drove them off his own Ground. They went into another Man's Ground, which had no Hedge to divide it from the Defendant's Grounds, which were contiguous. The Dog *pursued* them into the *other* Man's Land, so next adjoining. The Defendant, as soon as the Sheep were out of the Defendant's own Land, called in his Dog, and chid him. The Owner of the Sheep brought an Action of Trespas, for *chasing* his Sheep. The Court gave Judgment "*quod Querens nil capiat per Billam;*" being of Opinion "that Trespas lay not in that Case:" For, They held it to be an *involuntary* Trespas; whereas a Trespas that may not be justified, ought to be done *voluntarily*. They thought He might lawfully drive the Sheep out of his *own* Land, with his Dog; and He did his best Endeavour to recal the Dog, when they were driven out of it: But the Nature of a Dog is such, that he could not be recalled and withdrawn suddenly and in an Instant. Therefore Trespas did not lie against him for what He had done.

But the present Case can't be considered as an accidental *involuntary* Trespas.

The RULE to shew Cause "Why the Verdict should not
"be set aside, and a New Trial granted," was DIS-
CHARGED.

The End of *Easter* Term 1767, 7 G. 3.

Trin. Term

7 Geo. 3. B. R. 1767.

Rex *versus* James Owen als'. Dovaston.

Monday 22d
June 1767.

THE Defendant was brought into Court, upon the Return of a Writ of *Habeas Corpus* directed to the Sheriff of *Shropshire* and also to the Keeper of the Gaol of and for the said County. They return a Commitment to and Detainer in the King's Prison, under their Custody, on 3d *May* last, by Virtue of a certain Attachment or Commitment under the Hands and Seals of *Thomas Trevor* and *William Roberts* Two of His Majesty's Justices of the Peace for the said County of *Salop*: Which said Attachment or Commitment is in the Words and Figures following; To all Constables Thirdboroughs and Other His Majesty's Officers in the County of *Salop*, and also to the Keeper of His Majesty's Gaol for the said County—*Shropshire*, to wit, Whereas the worshipful *Richard Smalbroke* Doctor of Laws, Vicar General and Official Principal of the Right Reverend Father in God *Frederick* by Divine Permission Bishop of *Lichfield* and *Coventry* and of his Episcopal Consistory Court of *Lichfield* lawfully constituted, hath *certified* to Us, Two of His Majesty's Justices of the Peace for the said County of *Salop*, under the Seal of his Office, That *James Owen* otherwise *Dovaston*, of the Parish of *Westfelton* in the County of *Salop* and Diocese of *Lichfield* and *Coventry*, hath disobeyed and contemned the Process and Proceedings of the Ecclesiastical Court of *Lichfield*, in *not appearing* before Him his Surrogate or other competent Judge in that Behalf, on a certain Day Time and Place duly appointed for his said Appearance, (and of which, personal Notice was given to Him,) to answer the Reverend *Joseph Dixon* Clerk, Rector of the Rectory and Parish-Church of *Westfelton* aforesaid, in a certain Cause of Subtraction or Non-Payment of Tithes AND other Ecclesiastical Rights and Emoluments, promoted by the said *Joseph Dixon* Clerk, against Him the said

James

James Owen otherwise *Dovaston*; and hath desired our Aid and Assistance for the ordering and reforming the said Person, according to the Statute of 27 H. 8. c. 20. in that Case made and provided, and confirmed by a Statute of 2 & 3 Ed. 6. c. 13. These are therefore in His Majesty's Name, *by Virtue of the said Statute*, to will and require you or Some of you, that you forthwith attach or cause to be attached the Body of the said *James Owen* otherwise *Dovaston*, and Him deliver to the Keeper of His Majesty's Gaol for the said County of *Salop*, there to remain *without Bail or Mainprise*, UNTIL he shall have found sufficient Surety, to be bound by Recognizance or otherwise before Us or Some other Justice of the said County, to the Use of our Sovereign Lord the King, to GIVE DUE OBEDIENCE to the *Process Proceedings Decrees and Sentences* of the Ecclesiastical Court of *Lichfield* aforesaid. Hereof fail not, at your Peril. Given under our Hands and Seals, the first Day of *May* &c, &c, &c.

Sir *Fletcher Norton* and Mr. *Asburst*, on Behalf of the Defendant, insisted that this Commitment was *illegal*; and took several Objections to it.

- * V. Sect. 1. 1st Objection. It professes to be grounded on 27 H. 8. c. 20*.
 † V. Sect. 13. which Statute is confirmed and enlarged by 2 & 3 Ed. 6. c. 13 †.
 ‡ V. Sect. 4. And 32 H. 8. c. 7 ‡. being made in *pari materia*, must be taken in. The "Contempt, Contumacy, or Disobedience," mentioned in the first of these Statutes is explained by the second and third of them, to be a Contempt or Contumacy, or Disobedience AFTER Sentence. V. 32 H. c. 7. § 4. and 2 & 3 Ed. 6. c. 13. § 13.

There never was an Instance in the Ecclesiastical Court of a Proceeding in this Way, upon what may be called *mesne Process*. Their Method is, to decree against the Person; and, after Sentence, to excommunicate for Contumacy in not obeying the Sentence: And if He remains excommunicate 40 Days after Publication, a Writ *de excommunicato capiendis* is awarded against Him.

There is no Instance in this Court, of such a Proceeding upon the 27 H. 8. c. 20. as this is. None of the Officers of the Court remember such a Return to a *Habeas Corpus*. And it appears by the 4th Section of that Act, that it was only meant to be *temporary*.

The Case of *Rex versus Sanchee and Others, Quakers*, reported in 1 *Ld. Raym.* 323. || and other Books, was argued upon different Principles: It was argued that the Jurisdiction of the Spiritual Court was taken away by 7 & 8 W. 3. c. 34. That Case shews that

|| See also 12 Mod. 165. and 1 Holt 657. S. C. Hil. 9 W. 3.

that there *has* been a Proceeding upon this Act, so lately as in King *William's* Time; and 27 H. 8. c. 20. was then considered as being in Force. Yet in that Case, the Statutes of 32 H. 8. and 2 & 3 Ed. 6. were not taken into Consideration.

If this Method be legal, no Writ *de excommunicato capiendo* will ever be applied for. If They can do it in this summary Way, they need not stay 40 Days required by 2 & 3 Ed. 6. c. 13. § 13.

They observed, That Dr. *Burn*, in his Ecclesiastical Law, Vol. 2. p. 446. (under the Words of 27 H. 8. c. 20. "shall have Power to attach,") refers to the Case of *Rex versus Sanchez*, in 1 Ld. Raym. 323; but seems to have found *no other* Case of the same Kind.

2d Objection to the Legality of the Commitment.—The information ought to have been *upon Oath*. A Man ought not to be deprived of his Liberty, without an Oath: Whereas this Commitment is founded upon the *mere Certificate* of the Ecclesiastical Judge.

3d Objection.—Upon a Writ *de excommunicato capiendo*, they must shew precisely, "that the Ecclesiastical Court have Jurisdiction." Now this suit is only alledged to be for Tithes AND OTHER Ecclesiastical Dues: Which, they said, is not sufficient; and cited 1 Ld. Raym. 323. the Case of the Quakers before-mentioned.

4th Objection.—The Justices ought *to have convened* the Party before them, in Order to have afforded him an Opportunity of giving Security: But, instead of that, He was carried directly to Prison, without being permitted to give Bail, (which they said, was offered.)

5th Objection.—The Certificate is improper, *for Want* of reciting "that the Bishop was out of the Diocese:" For, otherwise the Certificate ought to have been *by the Bishop*.

6th Objection.—The Certificate does not import to be a *Request*. The Jurisdiction of the Justices can not vest, without an Information AND *Request*: Both are necessary. And no Requisition shall be *presumed*. The Certificate goes no further than that the Man did not appear.

Mr. MORTON, *contra*, had begun to answer these Objections—But

Lord MANSFIELD declared Himself to be very clear upon this Matter.

The Statute of 27 *H. 8.* is *not repealed*. That Statute and the Statutes of 32 *H. 8.* and 2 & 3 *Ed. 6.* are *diverso intuitu*: The latter do not mean to repeal the former.

The Officers of this Court not remembering any Instance in this Court of such a Return to a Writ of *Habeas Corpus*, is nothing at all. It is probable that the Person attached always gave Bail, whenever any such Case happened; and did not apply for a *Habeas Corpus*, at all.

As to Proceedings in the Ecclesiastical Court—There is no Reason to complain of the Manner in which the Persons who claim the Tithes, have proceeded. They have chosen the easier quicker and cheaper Method, instead of taking that which was the most vexatious, dilatory and expensive.

If the Statute of 27 *H. 8.* is not repealed, then consider what is the Construction of it. The Contempt is in Non-Appearance to the Suit instituted in the Ecclesiastical Court. The Ecclesiastical Judge has certified this, under his Seal of Office; and hath desired the Aid and Assistance of the Justices.

It is objected that here is no Information on *Oath*—But why is there Need of an Information *upon Oath* of the Proceeding of a Court? The Ecclesiastical Court are to make Information and Request: And then They are to have this Assistance from the Justices.

As to the *Form*—It is “In a certain Cause of Subtraction or “Non-Payment of Tithes AND *other* Ecclesiastical Rights and “Emoluments.” This is said to be an *Uncertainty* in the Demand: And that it *may* perhaps be a Suit for Demands *not within the Jurisdiction* of the Ecclesiastical Court.

In *Fex versus Sanchee*, reported in 1 *Ld. Raym.* 323. the Court were in the Right, to lay hold of the nicest objections, in a Case circumstanced as that Case was. But there, it was expressed in the *Disjunctive*, “Tithes OR other Ecclesiastical Duties:” This is, “*Tithes AND other.*” So that it clearly appears that the Ecclesiastical Court *had Jurisdiction* in the present Case, *as to the Tithes.*

This seems a much better easier and shorter Method than the Other. This is only aailable Process, to appear and submit to the

the Jurisdiction. It is a Demand of a few Shillings. And the Man is no Quaker.

Therefore this Man ought to be admitted to Bail.

Mr. Justice YATES concurred. As to Information *and* Request being Both of them requisite—Here, the Justices acted merely *ministerially*. The contumacious Person is to be attached, and to remain in Ward till He shall have found sufficient Security. The Act of 27 H. 8. c. 20. ought to be taken disjunctively—“Information *or* Request.” This Act relates only to *mesne Process*: And though the first Words are “make Information *and* Request; yet in *two subsequent* Parts of it, the Words are “such Information *OR* Request,” in the Disjunctive.

This is a much shorter easier and better Method of Proceeding, than that of Excommunication: It does not harass and oppress; but only requires giving Security.

Here is an *express Request* stated upon this Return: Though, perhaps, the Ecclesiastical Judge's mere sending the Certificate might well enough be considered *as a Request* to give the Aid and Assistance directed by the Statute.

It lay upon the Party attached, to *offer* his Bail; if He had a Mind to give any.

Most clearly, the Commitment is *legal*: The Man must give Bail.

Mr. Justice ASTON fully concurred in *omnibus*, for the Reasons already given. And as to the Continuance of the Act of 27 H. 8. The Statute of 2 & 3 Ed. 6. expressly says *—“That * See the Preamble of it.
“not only the said Acts made in the said 27th and 32d Years
“of the Reign of the said late King H. 8. concerning the true
“Payment of Tithes, and every Article and Branch therein
“contained, shall abide and stand in *their full Strength and Vir-*
“*tue*: But also—Be it further enacted &c.”

Mr. Justice HEWITT expressed some Doubt. He thought, the Statute of 32 H. 8. seems to mean to give the *same* Remedy to Lay-Impropriators, as 27 H. 8. gave to Ecclesiastical Persons. Therefore it seems constructive of 27 H. 8: And consequently, they should be both construed alike.

The Statute of 2 & 3 Ed. 6. § 13. says, that suits for withholding Tithes shall be in the Spiritual Courts only; and gives
I Them

Them Power to excommunicate, *after Sentence*, for not obeying their *Sentence*.

But 32 H. 8. does *not* give the *same* Remedy as 27 H. 8. does; *unless* the former be construed agreeably to the latter: Which latter expressly says, that "AFTER *definitive Sentence*," such Application may be made to the Justices (§ 4.)

Therefore He had some Doubt "Whether this is a proper " Proceeding under the 27 H. 8." as it is *before* a definitive Sentence.

He remarked also, that it did not very clearly appear "that the Parties dwelt in the County." Whereas the 27 H. 8. gives the Jurisdiction only to two Justices of the Peace of the *Shire where the Offender dwelleth*."

Again, The Suit is only, generally, "for Subtraction of " Tithes:" But it does not appear that these Tithes *arise* WITHIN the Parish, or were due to *Joseph Dixon*, as the *Rector* of it. Whereas the Power of convening the Offender before the Ordinary is given to the Parson Vicar Curate or other *Party aggrieved*: and, consequently, so also is the Remedy annexed to it; *viz.* the Demanding the Aid of the Justices of Peace.

Therefore He was not fully satisfied that the Proceeding was to be defended under 27 H. 8. and wished it might be further considered.

THE COURT, thereupon, were about to order it to stand over, upon Mr. Justice *Hewitt's* Doubts.

But Sir *Fletcher Norton* chose to give Bail, now; rather than risk being too late for a Motion which He intended to make against the Justices, for the *Manner* of their acting in this Affair.

A RECOGNIZANCE was accordingly taken from the Defendant with two Sureties, agreeable to the Requisition of the Statute: The Principal, being bound in 5*l*; and each Surety in 50*s*. (the Value of the Tithe being very small, not exceeding 15*s*.)

WHEREUPON the Defendant was DISCHARGED out of CUSTODY.

Clayton, the Younger, *versus* Andrews.Tuesday 23d
June 1767.

ASSUMPSIT, for Non-Performance of a Contract for Sale of Corn. "*Non assumpsit*," pleaded. On a Trial at *Suffex-Affizes*, a Verdict was found for the Plaintiff; subject to the Opinion of this Court, upon the following Case and Question.

The Defendant, on 13th October 1766, agreed to deliver One Load and an Half of Wheat to the Plaintiff, *within three Weeks or a Month* from the said Agreement, at the Rate of twelve Guineas a Load, TO BE PAID *on Delivery*: Which Wheat was understood, by both Parties, to be at that Time *unthresbed*. No Part of the said Wheat so sold was *delivered*; nor any Money paid by Way of *Earnest* for the same; nor any *Memorandum* thereof made *in Writing*. And "Whether this Agreement be "*within the Statute of Frauds*," is the Question. *V. 29 C. 2. c. 3. § 17.* which enacts "that no Contract for the Sale of any "Goods Wares or Merchandizes, for the Price of 10*l.* Sterling "or upwards, shall be allowed to be good; except the Buyer "shall accept Part of the Goods so sold, and actually receive the "same; or give something in Earnest; or that some Note or "Memorandum of it in Writing be made and signed."

[Mr. Baron *Smythe*, who tried the Cause, thought this Case to be like that of *Towers versus Sir John Osborne*, in *1 Strange 506*.]

Lord MANSFIELD directed the Counsel for the Defendant to begin.

Mr. *Burrell*, for the Defendant, having finished what He had to say—

Mr. *Harvey* was beginning for the Plaintiff: When

Lord MANSFIELD stopt Him; saying the Case was clear: That Case in *1 Str. 506.* of *Towers versus Sir John Osborne*, *Hil. 8 G. 1.* at *Guild-Hall*, before *Pratt*, Chief Justice, is directly in Point. There, the Defendant bespoke a Chariot; and when it was made, refused to take it. And in an Action for the Value, it was objected, that they should prove Something given in Earnest, or a Note in Writing; since there was no Delivery of any Part of the Goods. But the Chief Justice ruled it, *not* to be a Case within the Statute of Frauds; which relates only to Contracts for the actual Sale of Goods, where the Buyer is *im-*
PART IV. VOL. IV. Z z *mediately*

mediately answerable, without Time given him by special Agreement, and the Seller is to deliver the Goods *immediately*.

Mr. Justice YATES—That Clause of the Statute relates only to *executed* Contracts. Here, Wheat was sold; to be delivered at a *future* Time. It was *unbrashed* at the Time when the Contract was made: Therefore it could not be delivered at *that* Time. The Case mentioned out of Sir John Strange is in Point.

Mr. Justice ASTON concurred; and added, that the Case in 1 Str. 506. has always been considered as an Authority in Point, upon Questions of this Kind.

Per Cur'. unanimously—

ORDERED that the Postea be delivered to the Plaintiff or his Attorney.

Rex *versus* Justices of Cornwall.

A MOTION was made by Sir Fletcher Norton, Mr. Dunning, and Mr. Lucas, to quash an Order of the Quarter-Sessions of the County of *Cornwall*, made for quashing a Rate made for the Relief of the Poor of the Borough of *St. Ives* in that County.

But, on being asked “what was their *Objection* to the “Order of Sessions;” They could only assert “that the “Original Rate was a good Rate, and *ought not* to have “been quashed:” But they complained that by the Conduct of the Justices at Sessions, They were precluded from taking any *particular* Exceptions to the Order of Sessions; in as much as the Sessions had only quashed the Rate *in general*, without giving any Reason at all *why* They did so, or even *bearing* any Objections that could have been made to it.

THE COURT were unanimously of Opinion, that They could not be let in, to make a Motion to quash this Order of Sessions: For, the Jurisdiction was vested in the Sessions; who were *not obliged to give any Reasons* why They quashed it. It was left to Them, *to exercise their Discretion*, upon the Appeal: They have done so, and have quashed the Rate; and They can not be compelled to *specify* the *Reasons* upon which They have quashed it.

Sir

Sir *Fletcher Norton* still urged, that if the Original Rate should appear to this Court to be a *good One*, They ought to confirm it.

But He was answered by the Court, That the Sessions, to whom the Power of judging upon it was delegated, have quashed it; and there appears no Ground to suppose that They have determined wrong. Therefore

Take Nothing by the MOTION.

Janffen, Bart. Chamberlain of London, *versus* Green. Friday 26th
June 1767.

THIS was an Action for a Forfeiture on 6 *Ann. c. 16. § 5.* for having acted as a *Broker*, without being admitted so to do by the Court of Mayor and Aldermen.

That Statute enacts “that every such Person so offending shall
“ forfeit and pay to the use of the said Mayor and Commonalty
“ and Citizens, for every such Offence, the Sum of 25 *l.* to be
“ recovered by Action of Debt, in the Name of the Chamber-
“ lain of the said City.”

The Declaration charges divers Instances of his acting as a Broker: To which He pleaded the General Issue.

The Point reserved at the Trial was, “Whether a Person,
“ who *for Brokerage and Hire* negotiates and concludes Bargains
“ for *Stocks*, is a *Broker* within 6 *Ann. c. 16.*”

Mr. *Eyre*, Recorder of *London*, for the Plaintiff—

The Act of 3 & 4 *W. 3. c. 32.* “for restraining the Number
“ and ill Practice of Brokers and Stock-Jobbers,” recites the
Inconveniencies of the Number of such Brokers and Stock-
Jobbers encreasing very much: and, to prevent such Inconve-
nience and their ill Practices, it enacts that no Person whatso-
ever shall act as a Broker, directly or indirectly, within the Bills
of Mortality, till He be first admitted, licensed, approved and
allowed of by the Lord Mayor and Court of Aldermen of the
City of *London*, upon such Certificate of their Ability Honesty
and good Fame, as hath been usual; under a Penalty of 500 *l.*
That Act contains several other Regulations: But it was only
temporary, for three Years. After it's Expiration, the Sixth of
Ann. was made: Which gives them the Power and Profit of ad-
mitting

mitting Brokers. These therefore are the same Sort of Brokers as are the Subject of the former Act.

Mr. *Wallace*, *contra*, for the Defendant, argued, that the Defendant has not acted as a Broker, *within the Sixth of Ann.*

The 1 *Yac.* 1. c. 21. describes a Broker, and defines a Broker to be a Person acting between Merchants or Tradesmen, in making and concluding Bargains concerning their Wares and Merchandizes, and Monies to be taken up by Exchange. But this Man's Act of negotiating Contracts for *Stocks* between One and Another, for Brokerage and Hire, is not within *that* Description.

By the last Clause of 8 & 9 *W.* 3. c. 32. Brokers of Stock, though admitted according to that Act, were prohibited (for a limited Time) from dealing; unless they should have a Licence from the Treasury. And it extends to Stocks *then* existing: The Words are—"Securities upon any Fund or Funds granted by Parliament. Whereas *this* Stock is subsequent both to 8 & 9 *W.* 3. and 6 *Ann.*

* V. 7 G. 2.
c. 8. § 9.

LORD MANSFIELD—Is not Sir *John Barnard's* Act* to prevent Stock-Jobbing, decisive of this Question? It directs, that "every *Broker*, or other Person who shall *negotiate or act* " *as a Broker*, receiving Brokerage in the buying selling or " otherwise disposing of any of the said public or joint Stocks " or other public Securities, shall keep a Book, which shall be " called *The Broker's Book*." Can any Words more strongly express what the Parliament meant by a *Broker*?

Mr. Justice YATES—The Court will follow the parliamentary Idea of a Broker: And Sir *John Barnard's* Act ("to " prevent the infamous Practice of Stock-Jobbing,") is conclusive as to their Idea of a Broker. It also appears, from the Statute of 10 *Ann.* c. 19. *sect.* 121.

The Two Other JUDGES concurred.

LORD MANSFIELD—The Case of a Merchant who acts by Commission from a Correspondent abroad, may be a different Case: But here is Nothing in the Case before Us, to distinguish this Commission from common Brokerage.

Per CUR'. unanimously—

POSTEA to be delivered to the PLAINTIFF.

Boswell *versus* Irish.Saturday 27th
June 1767.

MR. Cox moved, on Behalf of the Defendant, That the Plaintiff, being gone to reside abroad, and having left no Effects in *England*, might give *Security for the Costs*, in Case of a Verdict or Judgment for the Defendant. But

THE COURT were clear that it was altogether contrary to Rule *; and had been denied over and over. * V. ante, p. 1026.

Mr. Justice ASTON said that He had taken so many Notes of the Refusal of such Motions, that He had ceased to take any more, as being a Point fully settled.

Mr. Justice YATES also mentioned a very strong Case, where it was refused, though it appeared that *Peter Mingotti*, the Plaintiff, lived totally in *Italy*, and never meant to come to *England*. He said, it was clogging the Course of Justice.

Per CUR'. unanimously—

MOTION DENIED.

Rex *versus* Edwards, and Symonds, Clerk.

MR. Morton and Mr. Thurlow, on Behalf of the Defendants who were charged with a Contempt, moved that They might come in personally and *acknowledge* the Contempt; *without answering the Interrogatories* which were exhibited against Them.

The Contempt charged upon Them was their not obeying a *Mandamus* to sign a Poor-Rate; and their keeping out of the Way, to prevent being obliged to do so: Which Offence They were ready to *acknowledge*, and submit to be punished for, in such Manner as the Court should think proper.

They cited 1 *Strange* 444. *Rex versus Barber*; where the Defendant objected to answer an improper Question put to Him: And the Court ordered the Interrogatory to be suppressed. They cited, as in Point, a Case of *Rex versus Burridge*, 9 G. 1. in this Court; where They said the Defendant, before answering Interrogatories, came in and confessed the Charge; and the Court imposed a Fine upon Him. And They said it was reasonable and

proper to admit a Person charged with a Contempt, to come in and confess it immediately. Improper Interrogatories may be offered; which the Counsel have no Opportunity to see; and the Defendants may therefore be drawn in, to charge Themselves criminally. What can they do more, than confess the Charge?

Sir *Fletcher Norton*, for the Prosecutor, said They were charged with much more than had been represented: They are charged not only with the Act, but also with doing it *out of corrupt Motives*.

THE COURT were clear, this Motion ought not to be granted. The Attachment is to bring them into Court, to answer to Interrogatories *to be* exhibited. There is Nothing to plead guilty to, till the Interrogatories are *filed*: Neither are They in Contempt till *reported* so. There is Nothing appearing to the Court at present, whereupon to *ground* a Judgment or Fine or any Punishment.

As to the Case of *Rex versus Burridge*—Such a Case must have been by Consent*: Or else, it can not be Law.
* I find a Case of *Rex v. Burridge*, amongst my Notes of Trinity Term 1724, 10 G. 1. B. R. when an Attachment was granted against him. And the same Case is reported in 2 Ld. Raym. 1364. and in 8 Mod. 245. But I can find Nothing about this Confession before answering Interrogatories.

Per CUR'.

MOTION DENIED.

Rex versus Tarrant.

ON shewing Cause why an Information should not be granted against an Overseer of the Parish of *Hewish*, for procuring one *Richard Few*, a poor Man of the Parish of *Wilcot*, to marry *Elizabeth Swanton* a single Woman with Child of a Bastard; in Order to get the Bastard settled in the Parish where the Husband was settled—

The RULE was made ABSOLUTE for an Information.

Humphry

Humphry *versus* Leite.Wednesday
1st July 1767.

MR. *Hotchkins* had moved to stay Proceedings against One of the Bail, who had been excepted to, and consequently had not justified; but had omitted to get his Name struck out of the Bail-Piece. He came very *late* with this Application; *viz.* after two *Scire facies*, and *Nichils* returned to them. However, the Court gave Him a Rule to shew Cause.

Mr. *Lucas* now shewed Cause, on Behalf of the Plaintiff.

Mr. Justice ASTON remembered and cited a Case of **Clement versus Tubb* and *Leper versus Tubb*, in 26 G. 2. on Mr. *Ford's* Motion, on Behalf of *Dighton*, who had been excepted to, but his Name remained upon the Bail-Piece. Mr. *Ford* cited a Case of † *Wilkinson versus Lomax*, "That if Bail is objected to, and so does not justify, but his Name is not struck out of the Bail-Piece, He shall not be considered as remaining liable: And it is Time enough for Him to apply, when He first finds Himself attacked." Therefore an *Exoneretur* was entered against *Dighton*: though He did not object till He was attacked."

* I have a full Note of this cited Case, by the Name of *Tubb v. Tubb*. It was Bail in Error. *Dighton* was excepted to: *Leper* was added, in his Stead. *Leper* became insufficient. Whereupon, the Defendant

in Error, on Affirmance of his Judgment, proceeded against *Dighton*. Upon which, Mr. *Ford* moved to strike *Dighton's* Name out of the Recognizance.

† N. B. The Case cited by Mr. *Ford* was, according to my Note, *Jenkinson v. Lomax*.

Mr. Justice YATES said, there was an old Case, "that a Bail who was excepted to, and had not justified, must apply in proper Time, to have his Name struck out of the Bail-Piece."

But in P. 4 G. 3. in a Case of *Fulk versus Birk*, upon Mr. *Asburst's* Motion, to stay Proceedings against the first Bail, who had not been struck out of the Bail-Piece, though He was excepted to, and had not justified; it was thought, that whilst his Name remained on the Record, the Proceedings could not regularly be stayed: And therefore the Court advised Mr. *Asburst* to change his Motion, and move "to enter an *Exoneretur nunc pro tunc*." Whereupon, He accordingly moved it so: And I suppose it was so done; Though I knew Nothing further of it, than what I have mentioned.

Per CUR.'

On Payment of Costs, let an *Exoneretur* be entered, *nunc pro tunc*.

Goodwin

Thursday 2d
July 1767.

Goodwin *versus* Gibbons, One &c.

AFTER Two Verdicts for the Plaintiff, the Defendant had moved for another new Trial. It was an Action of Trespafs: And the Trials had been in *Chester*.

The Defendant was an Attorney. At the first Trial the Jury found that He had acted beyond his Office and Authority or his Duty as an Attorney; and gave a Verdict for the Plaintiff: Which Verdict was set aside, and a New Trial granted. The second Verdict was also found for the Plaintiff: Which second Verdict was now prayed to be set aside also; and a third New Trial was prayed. A Rule was made upon the Plaintiff, to shew Cause.

Upon shewing Cause, Mr. *Morton's* Report was read; and the Question was much litigated: But it is not necessary to specify the Particulars; because only the general Doctrine laid down is meant to be here taken Notice of.

Lord MANSFIELD—There is no Ground to say that a New Trial shall not be granted after a former New Trial has been once granted before.

* I suppose
his Lordship
meant 6th
Modern;
where the In-
dex says—

There is an Index to a Report-Book *, which mistakes a decisive *particular Reason* in a particular Case, for a GENERAL Rule. See Modern Cases, Index, under the Word "Trial."

After a Trial at Bar, a new Trial denied." *Sed qu.*

But there is no such general Rule as has been supposed. A New Trial must depend upon answering the Ends of Justice.

However, in the present Case, He said, He did not see any Reason for a new Trial. He observed that here is no Question of Right, nor any great Value: And upon the Whole, he was clear that no New Trial ought to be granted.

Mr. Justice YATES was clear, that a second New Trial might be granted, as well as a first, *if* the Reasons for granting it were sufficient.

But He also thought that in the present Case there was *no* sufficient Reason for granting one.

Mr. Justice ASTON—The Case of *Gwinne* versus *Poole et al*, in 2 *Lutw.* 935. which cites *Olliet* and *Bessey's* Case in Sir *T. Jones* 214. does not contradict the Position—"That an Attorney may exceed his Authority and Jurisdiction; and if he acts so with his Knowledge, may be guilty as a Trespasser." And the Case of *Moravia* versus *Sloper et al.* in *C. B. Comyns* 574. recognizes the Doctrine "that in justifying under the Process of an inferior Court, it is necessary to shew it to be within the Jurisdiction."

Upon the whole Circumstances of this Case, he concurred, that no new Trial ought to be granted.

Mr. Justice HEWITT—If an Attorney knows that the Case is out of the Jurisdiction of the Inferior Court, I think He will be answerable: Especially, if He knows it clearly. Here, He did know it. And besides this, the Jury have found that He even *went beyond and out of* his Duty as an Attorney.

The Granting a new Trial a second Time must depend upon the Circumstances of the Case: 'Tis very difficult to lay down any certain Rule. Indeed, if Two or Three Juries have determined upon the same Point and the same Circumstances, it may be a Matter of Discretion, not to grant a New Trial, but to leave the Matter at Rest.

Upon the Circumstances of the present Case, no New Trial ought to be granted.

Per CUR'. unanimously—

The RULE to shew Cause why there should not be a New Trial, was DISCHARGED.

Mayor of Norwich *versus* Berry, Gent.

Friday 3d
July 1767.

THIS was an Action for a Penalty of 40s. for the Breach of a By-Law.

The Declaration stated the Constitution of the Corporation; which was incorporated by a Charter of King *Henry* the fourth, with a Power to make By-Laws. The Charter impowers them to choose *a fit and proper Person* to be Sheriff &c. The Corporation made a By-Law, which is particularly set forth in the Declaration, and whereof the Validity was not contested, imposing

a Penalty of 40s. upon every Member of the Corporation duly elected Sheriff, who should refuse to take the Office upon Him. The Declaration then shews a due Election of the Defendant to be Sheriff; a due Notice to Him, of such his Election; and an absolute Refusal by Him, to serve and execute the said Office. It likewise states an Oath which he was obliged to take, "to serve the Office, and to submit to the Penalties &c."

The Defendant pleads, That he is, and was *at the Time of his Election* to the Shrievalty, and has *continued* for twenty Years last past, an ATTORNEY of the Court of Common Pleas at *Westminster*; and that he has, during all that Time practised, and *still does continue to PRACTISE as Such*; and that by the ancient Custom of that Court, Time out of Mind used and established, no Attorney of the said Court shall, *during the Time of his acting as Such*, be drawn or compelled &c &c: And so pleads his Privilege in due Form. He then shews that the Oath of Office of Sheriff requires his Residence at *Norwich*, during his Shrievalty: which is incompatible with his necessary Attendance at *Westminster*, in the Court of Common Pleas. He shews proper Notice given by him, of this his Excuse and the Cause of his Refusal to take upon Himself and serve the Office; and he concludes with justifying such Refusal.

The Replication avers that he was *resident at Norwich*, at the Time when he was first admitted an Attorney of the Court of Common Pleas; and had been so for many Years before that Time: And that *being an Inhabitant and Housekeeper in Norwich*, he was admitted an Attorney of the Common Pleas.

The Defendant demurred to this Replication: And the Plaintiff joined in Demurrer.

The QUESTION was, "Whether a Corporator resident in the Corporation, and *afterwards* becoming and being admitted an Attorney of One of the Superior Courts in *Westminster-Hall*; and after such Admission, duly elected Sheriff of such Corporation; is *privileged from serving* the said Office."

Mr. *Ashurst*, on Behalf of the Defendant, argued in the first Place, that His being *resident at Norwich* is out of the Case; because it appears upon the Pleadings "That He has been a PRACTISING Attorney of the Court of Common Pleas for the last twenty Years:" And therefore the Place of his Residence is totally immaterial.

If an Attorney lays his *Venue* in *Middlesex*, it shall not be changed on Application by the Defendant, on Account of his Residence in the Country: Provided He continues a Practiser *Pope et Ux'. versus Redfearne, Un'. &c. H. 7 G. 3 **. • V. ante, p. 2027. (on the last Day of Hilary Term last.)

He is understood and *supposed* to be *attendant upon the Court*; whether He in Fact is so, or not.

Having laid this Point aside, as being out of the Case—

The *General Question* is, “Whether an Attorney *has* this Privilege, or not.”

This is the Privilege of the *Court*; not of the Attorney Himself.

The *Form of the Writ* of Privilege shews this: The *Form* of the Writ plainly considers it as such. And numerous are the Cases where Privilege has been allowed: *Prouse's Case* in *Cro. Car.* 389. An Attorney was elected *Constable*; but discharged from executing the Office: So also in *Noy.* 112. *Corner's Case*. In *George Venable's Case*, *Cro. Car.* 11. He had been pressed for a Soldier; and the Writ of Privilege was granted. In the Case of *Jonathan Evingdon*, an Attorney, 2 *Str.* 1143—He was summoned on the *London Militia*, and exempted: So, in *Heaton's Case*, 2 *Barnes's Notes*, p. 33†. *M.* 14 G. 2. He had his Writ of Privilege to excuse Him from serving in the Trained Bands of the City of *London*. And there is a Precedent of the like Kind in the *Officina Brevium* 164. and another in p. 174. In *Stone's Case*, 1 *Ventr.* 16, 29. who was a Copyholder of a Manor, and the Homage had chosen Him Collector of the Lord's Rent for the Year following; His Privilege was allowed. So, in the Case of Bailiff of a Borough, (*Officina Brevium*, 166;) or a Mayor of a Borough, (*Officina Brevium*, 174;) a Writ shall issue. *Evingdon's Case*, abovementioned, cites the two Precedents of *Officina Brevium* 164 and 174; and recognizes them. † P. 42. in 4^{to} Edit.

1 *Barnes's Notes* 29 ‡. *Seymour Richmond's Case*—He had been elected Bailiff of *Abingdon* in *Berks*: The Court refused to set aside the Writ of Privilege which he had obtained; and said, the Corporation must act at their Peril. ‡ P. 37. in 4^{to} Edit.

It appears by *Evingdon's Case* in *Sir J. S.* 1143. and by 1 *Lev.* 265. *Stone's Case*, that the Power of serving by *Deputy* makes no Difference.

However,

However, *this* Office can *not* be served by Deputy.

Here, the Sheriffs swear “that They or One of them shall “be *resident at Norwich* during the Time of their being “Sheriffs.” And the *Nature of the Office of Sheriff requires personal Attendance.*

If it be objected, “that He was a *Corporator at the Time* when “He was *admitted an Attorney*”—This is *no Crime* in itself; nor it One, with Respect to the Corporation. Upon his Admittance to be an Attorney of *C. B.* the *superior Privilege* of that Court *attached*: And the Court of Common Pleas has a Right to require his Attendance there, upon his *public Duty*, in Preference to that of a Member of a *private Corporation.*

Mr. *Wallace, contra*, for the Corporation of *Norwich.*

By the Charter of *H. 4.* the Corporation are to have Sheriffs.

The Privilege of an Attorney shall not protect a Corporator from accepting and executing the Office of Sheriff; which He is under a prior Obligation to accept; and was so, long before his Admission to be an Attorney of *C. B.*

In 1 *Ld. Raym.* 29. *Rex & Regina versus Larwood*—it is laid down by Lord Chief Justice *Holt* and Sir *Giles Eyre*, “that no “Man can be exempt from the Office of Sheriff, but by Act of “Parliament or Letters Patent.” In Proof whereof, are cited—*Savil* 43. *Herbert Pelham's Case*; and 9 *Co.* 46. *b.* The Earl of *Salop's Case.*

Mr. *Lee's Case*, who was chosen Expenditor of *Romney-Marsh*; and the Case of a High-Constable who was exempted from being Collector for the Poor, during his Office of High-Constable, in Sir *Thomas Jones* 46. and Alderman *Abdy's Case*, in *Cro. Car.* 585. and Sir *William Jones* 462. who being an Alderman of *London*, was discharged from serving the Office of Constable for his Parish in *Essex*; may all seem to be, in some Degree, Authorities against me.

But these were *inferior Offices.* So also was *Evingden's Case*, in 2 *Str.* 1143.

• N. B. The two Precedents in *Officina Brevium* are in *C. B.* Temp. Jac. 1.

As to *Officina Brevium* 166, 174 *. The two Precedents cited from thence are no Authorities. They are no settled Determinations: The Writs issued *of Course.*

There

There is no Writ of Privilege for Attornies, in the Register, as to *serving Offices*: They are only, as to *Suits*.

The Office of a Sheriff is *superior* to that of an Attorney.

By *entering into* the Corporation, He obliges Himself to bear all the Offices of it, to which He may be in future elected: And here He is also bound to it by his *Oath* as a Corporator.

Though an Attorney's Privilege is the Privilege of the *Court* to which He belongs; yet the Attorney may *wave* it. So, where He is Co-Defendant or Co-Obligor, He loses his Privilege.

He is therefore bound to bear this Office, in common with the other Citizens of *Norwich*.

Mr. *Asburst*, in Reply—This Question is between the Corporation and the Attorney, about a mere Corporate-Office: It is *not* a Question of Prerogative of the *Crown*.

The Superiority or Inferiority of the Office is not the Question: The Question is—"Whether the Court of Common Pleas are to lose the public Service of the Attorney, or not."

His Obligation and Oath to the Corporation must be confined to *such* Offices to which He is *properly eligible*. His Incapacity to execute it arises *upon* his being admitted as an Attorney of the Common Pleas; which was no Crime in Him: And if it was no Crime, He can not be *thereby* liable to a Forfeiture.

An Attorney can not be properly said to wave his Privilege. If it does not judicially *appear*, the Court can not indeed take Notice of it: But if it does judicially appear, the Court *may* interpose.

If an Attorney is joined with *Others* as a Defendant, They can not All have Privilege: And therefore He loses *his*; because *All* must have it, or *None*.

LORD MANSFIELD, after stating the Case minutely, said The Question is very properly put, upon this Record.

I own, that on a former Motion relating to this Contest, I thought it hard that an Attorney should become a Member of a Corporation, and *enjoy all the Benefits* and Advantages accruing from his being a Member of such Society; and yet *avoid the Burthens* and troublesome Offices which the other Members of

the same Society or Corporation were obliged to submit to and undergo. I own, this appeared to Me to be unreasonable, when the Matter was first brought before the Court, upon an Application for an Information against this same Defendant, for refusing to take the Office upon Him: I had a strong Prejudice against this Claim of Exemption from it, upon the Reason of the Thing, on the *first View* of the Question.

But upon looking into the Cases, and hearing the Argument of the present Case, I think it is too late to recur to Principles, in the Light wherein I had considered the Matter. For, the Privilege insisted upon, as the Ground of Exemption, is the Privilege of the *Court*: And the Cases cited in Support of it are very strong; particularly, the Case of *Evingdon*, which relates to his Exemption from being on the Militia, a Service concerning the general public Safety of the Kingdom.

* Officina
Brevium 164
& 174.

I lay great Stress upon the two Precedents of near a Century and * a Half ago, and *no* Instance in Contradiction to them.

The Case of a Sheriff of a County at large may possibly be a different Case. But I know that *Barristers* are considered as exempt from serving *that* Office: And an Attorney might perhaps have the same Reason to object to it; though, indeed, that is not a Case so likely to happen.

Prouse's Case (in *Cro. Car.*) is very strong: For, there the Obligation to serve the Office arose from the Tenure of his Houses; and He had bought seven Houses in the Vill where He was elected Tithing-Man.

The Oath "to serve the Office and to submit to Penalties," is only to be understood of such as He is *not excused* from serving. And the Oath of Residence in *Norwich* is incompatible with his Attendance at *Westminster*, in the Court of Common Pleas.

Therefore it is now a settled Point. The Attorney ought to have his Privilege allowed.

Mr. Justice YATES—*If* He had *left off* his Business, his mere remaining on the *Roll* would be no Exemption to Him.

But it appears upon this Record, "that He is, and has for
" twenty Years continued, an *acting* Attorney of the Court of
" Common Pleas."

This

This is not a Contest merely between the City of *Norwich* and *this Man*. It is a Contest between the City of *Norwich* and the *Court of Common Pleas*. It is the Privilege of the COURT that is here in question. It has existed *as long* as the Court: And the Crown *could not*, by a Charter granted to a Corporation, take it away.

The Court must have *Ministers*: The *Attornies* are its Ministers.

The *inferior* Duty to the Corporation must give Way, where it interferes with the superior Duty to the Court and to the Public.

The Cases of *Stone* and of *Prouse* are very strong. The General Usage of the Kingdom, or the particular Custom of a Town, shall not take away this Privilege.

By the Charter, the Corporation are to choose a *fit and proper* Person. This Man is *not* so.

The Oath of the Corporator must be confined to *due* Elections, and to Persons not having a *lawful Excuse*. This Man *has* a lawful Excuse. An Attorney shall be exempt from all Offices *incompatible* with his Attendance in his Court. The Interest of the *Kingdom* is concerned in this. The King can not, by a *local* Charter, take away this Privilege. An Attorney has this Privilege, because He is *bound to attend the Court* of which He is a Minister: He is intitled to *this* Privilege, as much as He is to that of not being called out of his Court by a *Suit* brought against Him in another Court. And as He is obliged to this Attendance on the Court of Common Pleas; therefore He is not within the By-Law, which makes his Attendance requisite in another Place: For, He can not be necessarily attendant in both Places at the same Time.

Mr. Justice ASTON—*If* He had left off Practice, it had been quite another Case. In the Case of *Bury* versus *Maynard Clarke*, Esq. who had been an Attorney, and had left off Business, and would have set up his Privilege; there was produced a Rule of 1654, "That an Attorney not acting for a Year, (unless hindered by "Sickness,) shall lose his Privilege." The Name continuing on the Roll signifies Nothing.

But whilst He does *continue to practise*, the Privilege "of not "being drawn from attending his Court" is as old as the Court

on which he is attendant. The *Officina Brevium* shews it as far back as the Time of King *James* the First.

The Privilege is instituted for the Sake of the Suitor, “that the Attorney in his Cause shall not be drawn away from his Court, which it is his Duty to attend.” Therefore a *superior* or an *inferior* Office makes no Difference, in my Opinion.

Mr. Justice HEWITT—The Privilege of the City of *Norwich* is much more recent than this Privilege claimed as an Attorney. The Former is only since the Time of *H. 4*: But the Privilege of the Court of *C. B.* is *immemorial*. An Attorney is not to be drawn away from his Attendance on his Court, to attend ANY *other* Offices whatsoever. So says the Writ itself: And the Cases which have been cited, shew it. *Stone's Case* and *Prouse's Case* are strong.

The Cases do not enter into any Priority, or inquire *when* the Person *became* privileged: They all look at the Circumstances of the Party at the Time of his being *required to execute* the Office put upon Him.

Therefore, upon all the Cases considered, I think this Attorney is intitled to his Privilege.

Per CUR'. unanimously—

JUDGMENT for the DEFENDANT.

Friday 3d.
July 1767.

Rex versus Sutton.

SIR *Fletcher Norton* moved to quash an Indictment for a Nuisance in keeping a House (near *Epsom*) for inoculating for the Small-Pox. The Case of *Rex versus Wilmer and Nichols*, in *Easter Term 6 G. 3.* in this Court, was cited; and another Case or two were hinted at, where Rules had been made to shew Cause.

But *per CUR'*.—You must demur: We do not of Course quash Indictments for Nuisances, upon Motion. We have thought of this: We are not bound to quash *this* Indictment on Motion. You must demur.

MOTION DENIED.

Belither

Belither *versus* Gibbs.

Saturday 4th
July 1767.

THE Defendant had moved to be discharged on *Common Bail*; and had obtained a Rule to shew Cause why he should not be so.

The Question was, "Whether the Plaintiff in an Action of Debt upon a Judgment for *upwards* of 10*l*; can hold the Defendant to *Special* Bail, in *this* Court, where the *Original* Cause of Action was *under* 10*l*. but the Judgment, by the Addition of Costs, exceeded 10*l*."

Sir *Fletcher Norton*, on Behalf of the Plaintiff, shewed Cause, upon the last Day of last Term, why the Defendant should not be discharged on *Common* Bail.

He observed that the two Courts of King's Bench and Common Pleas *differ* in their Practice. *C. B.* hold to *Special* Bail, in such Cases: *B. R.* accept *Common* Bail. And he argued in Favour of the Practice of the Court of Common Pleas.

Costs are Damages. It is one entire Judgment: And it must be one entire Execution.

Mr. *Davenport*, *contra*, relied on the Practice of this Court; argued that it was right and reasonable; and cited the Cases of *Gammage versus Watkin*, *P. 7 G. 2. B. R. 2 Str. 975.* and *Robinson, Un'. &c, versus Nicolls*, *Tr. 10 & 11 G. 2. B. R. 2 Str. 1077.* strong in Point. In the former of those two Cases, the Debt was three Guineas: But the Costs swelled it to 14*l*. 10*s*. Here the Original Debt was only 3*l*. 9*s*. 6*d*; but by the Addition of Costs, it is swelled up to 14*l*. But, as the Original Demand did not require Bail, the Addition of Costs will not alter the Case.

LORD MANSFIELD—"Tis Pity that the two Courts should differ in their Practice upon an Act of Parliament*. There is **V. 12 G. 4; Reason*, I think, to lean against requiring Bail on the Action of *c. 29. § 1,* Debt on Judgment, when it could not be required in the Original Action.

In Error, brought upon an Action of Debt on Judgment, the Action of Debt on the Judgment follows the Nature of the Original Action: And yet Bail shall not be required on bringing a Writ of Error upon the Judgment obtained in the Action of

Debt on the first Judgment. This was so settled in the Case of *Bidlefon Esq. Administrator &c, versus Whytel Esq.* Tr. 4 G. 3. in this Court. [*V. ante, Vol. 3. p. 1545.*]

Mr. Justice ASTON—The Practice of *this* Court is more in Favour of Liberty, than that of the Common Pleas.

Lord MANSFIELD said, There should be a Uniformity between the two Courts. And He recommended it to Mr. Justice ASTON, to take a Note of this Matter, and talk with the Judges of C. B. about it. He observed, that the Subject will get Nothing by this Court's *not* holding to Bail; because the Plaintiff will bring his Action in the Court where He *can* hold the Defendant to Bail: So that the Defendant will not be at all relieved from finding Special Bail, when the suit may as well be brought in the Court which does require it, as in that which does not.

CUR'.—It is settled in *this* Court, “That Common Bail should be accepted:” And We must keep to our *own* Rule.

The RULE was therefore made ABSOLUTE, “That the Defendant be discharged upon *Common* Bail.”

Note—THE COURT took the proper Methods of obtaining a Uniformity of Practice in the two Courts, for the future. And, in Consequence thereof,

Lord MANSFIELD now declared the Result of a Conference they had had with all the Judges: Which he shortly expressed, in the Words, or to the Effect following—

I have laid this Matter before All the Judges. They All think *our* Practice to be the more reasonable, and more agreeable to the Act of Parliament: And I believe the Court of Common Pleas will alter their Practice.

Monday 6th July 1767. Rex *versus* Eyres and Bond, Manucaptors of Houncel.

THIS Recognizance had been forfeited; a *Scire facias* brought upon it; and a *Levari facias* issued; and the Sheriff returned 20*l.* levied of the Goods and Chattels of Bond; and that *Eyres* had not any Goods &c, whereof &c.

On *Tuesday* 12th of *May* last, Mr. *Stow* moved that I might tax the Prosecutor's Costs; and that they might be paid to the Prosecutor, *out* of this sum levied.

THE COURT gave Him a Rule to shew Cause: But the next Day, on being fully apprized how the Matter stood, and that it was the King's Money, They thought They could not make such a Rule; and Ordered that it should *not* be drawn up.

Mr. *Lucas* now renewed Mr. *Stow's* former Motion. He said the Court of Exchequer had been applied to: And that They thought the Matter was not sufficiently before *Them*, for *Them* to make any Order therein; it being, at present, before *this* Court.

LORD MANSFIELD—Let the Master tax the Costs: And let Notice be given to the Defendant and the Bail, to shew Cause why the Costs so taxed should not be paid to the Prosecutor; and the Surplus of the Money levied be returned to the Defendant or the Bail upon whom it was levied.

This is the best and easiest Method. The King has no Interest in this Money: He is only Royal Trustee for the Party.

Castelman's Case, ads'. Price, Clerk.

Tuesday 7th
July 1767.

(*V. post, pa.* .)

THIS was a Question on the Insolvent Debtor's Act, 5 G. 3. c. 41. wherein it was provided "that all those who did not obtain their respective Discharges before the 1st *August* in this Year 1767, should be excluded the Benefit of the Act." [*V. p. 725. sect. 40.*]

This Man had been brought up to the Quarter Sessions of *Surrey*; and They had declared Him to be *irrelievable*; because He was charged with an Outlawry: Therefore They remanded him.

Note—The Persons intitled to receive the Benefit of the Act, were thus described in it—"All and Every Person who on the 1st of *January* 1765, was or were, or at any Time since have been, and at the Time of making out every such List shall be, really, an actual Prisoner or Prisoners in the Custody of any Gaoler or Gaolers or Keeper of any Prison respectively, upon any Process WHATSOEVER, for or by Reason of any DEBT, DAMAGE,

“ DAMAGE, Costs, Sum or Sums of Money, *Contempt*, OR
“ OTHERWISE.”

Mr. *Cox*, on Behalf of the Defendant, said it was a very hard Case; and a Case of great Compassion.

The DIFFICULTY was how to come at Relief.

The COURT thought, The best Way would be by removing the Order hither: And, there being no Clause in the Act to prohibit a *Certiorari*, They granted One.

Ailward's Case was mentioned, where a Verdict had been obtained against Him, in an Action for a malicious Prosecution, and 500*l.* Damages; and the Defendant was committed thereon, and remained in Prison upon a special *Capias utlagatum*, for that Cause only.

V. post, towards the End of this Term.

Wednesday
8th July 1767.

Rex *versus* Dawes:

Rex *versus* Marten.

* *V. ante*,
p. 1962. and
p. 2022.

(* *Winchelsea* Causes.)

THESE Causes stood adjourned from *Tuesday* the 10th of *February* last.

The COURT having maturely considered them—

Lord MANSFIELD now delivered their Resolution; after recapitulating the Substance of what had already past.

* *V. ante*,
p. 1962.

It having been suggested, from the Bar, upon the Occasion of different Motions impeaching the Titles of Corporators in the Borough of *Winchelsea*, after a long quiet Enjoyment; “ that it
“ would be absolutely necessary to *draw a Line*, and to *fix the*
“ *precise Period* of Possession, which ought not to be disturbed
“ by any Information in the Nature of a *Quo Warranto* granted
“ under the discretionary Power given by 9 *Ann. c. 20* ;” the
Court declared, in the Beginning of last *Michaelmas* Term *,
“ that, from the Reason and Analogy of several Statutes upon
“ several Matters, a quiet and undisturbed Possession of a Fran-
“ chise for 20 *Years*, ought to be a Bar to any Application made
“ to *this Court* ; though it could be no Bar to the *King Him-*
self,

“ *self*, if He should think fit to prosecute the Usurpation by his
“ Attorney General.”

The Court, at the same Time declared, “ that, *within* 20
“ Years, Length of Time might weigh as *presumptive* Evidence;
“ or as *one Circumstance* joined to Others, to shew the Impro-
“ priety of granting an Information.”

Agreeable to this Distinction, in the same Term, the Rule
against *Edwin Wardroper* was discharged*. The Objection of * V. ante,
Non-Residence at the Time of his Election being denied, the P. 1965.
Length of Time, though within 20 Years, supported the Denial,
and set the Informers in so unfavourable a Light, that the Rule
was discharged *with Costs*.

In *Hilary* Term, the Rule against *Richard Wardroper* (Length
of Time, though within 20 Years, supporting and corroborating
his Defence,) was discharged †. † P. 2025.

In the same Term, the Rule now under Consideration against
Dawes was discharged ‡. The Counsel for *Dawes* did not read † P. 2024.
his Affidavit: The Counsel for the Rule talked of it, and ob-
served upon it, but did not choose to *read* it.

A Doubt arose in my Mind, “ Whether the Rule was *rightly*
“ discharged;” because, if *Dawes* did not deny the Incapacity
objected to Him, which was a Fact within his own Knowledge,
it ought to be taken to be true.

I doubted “ whether, the Defect of Title being *admitted*, an
“ Information ought to be refused, if applied for *within* 20
“ Years.” But, if it ought to be refused; as *Certainty* is one
great object of all legal Determinations, and peculiarly to be
wished for in that Branch of the Law which concerns Corpora-
tions, (because such Questions are often agitated with a Heat and
Spirit not to be satisfied by the best Reasons of the soundest
Discretion, and only to be checked by the Authority of Rules
and Precedents deliberately settled upon former Occasions;) I
wished the Matter might be *further considered*; and that the Rea-
sons of the Judgment, whatever it might finally be, should be
fully understood. I mentioned my Doubt the next Morning.
Then, the Affidavit of *Dawes* was *read*; which does, in Effect,
admit the Objection at the precise Time of his Election.

We took Time to think of it.

In the same Term, came on the Rule against *Thomas Marten*,
now under Consideration: And Both were enlarged, with Liberty

to file Affidavits, as to the Consequences to the Corporation, from granting Informations against Either or Both of Them *.

* V. p. 2023,
2024.

The Affidavits made pursuant to this Order, were read last *Easter Term*: But, a Bill having been brought into the House of Commons, relative to the Subject Matter of these Motions, We *suspended* giving any *Opinion*. The House of Commons not having thought fit to entertain that Bill, We are now called upon to *give our Judgment*.

And first—As to the Rule against *Dawes*—

It is an Application, for Leave to exhibit an Information against him, to shew by what Authority He claims to be a Freeman of the Borough of *Winchelsea*; upon *this Ground*—“That by the
“ Constitution of the Borough, No Person can legally be elected
“ a Freeman, who does not *reside and pay Scott and Lott* in the
“ Town, at the Time of his Election: That *Dawes* was elected
“ on the 22d of *September 1747*; and that He *did not* then, or
“ at any Time before, *reside or pay Scott and Lott* in the
“ Borough.”

It appears upon the Evidence, That before his Election to the Freedom, He was *Town-Clerk* of the Borough, and constantly attended all the Corporate Business; That soon after his Election, He *hired a House* in the Town, and has *dwelt there* ever since, with his Wife and Family; That from that Time to this He has *served All the Parish Offices*, and paid all Kinds of *Taxes*; That Two of the Three Informers were *present* at his Election, and *voted for it*; That He has generally *voted* in the Corporate Assemblies at the *same Time* with all the Three Informers, and None of them ever made the least *Objection* to his Right, *till* within Nine Months before this Application; That He has been elected into and served the Office of a *Jurate* from the Year 1756; That He has *twice been Mayor*, and in 1762 was elected to that Office *unanimously*; That He has constantly *exercised all the Rights of a Freeman*, from the Time of his Election in 1747 till the present Application, *without* any Interruption whatsoever; That *many derivative Rights* would be *affected* by a Flaw in his Title; which might throw the Borough into great Confusion, and perhaps tend to a Dissolution of the Corporation.

UNDER these Circumstances, We are clearly and unanimously of Opinion, That it would be contrary to the Trust reposed in Us, by the Statute of *Queen Anne* (which had a View to *speedy Prosecutions*, and to *quicken* the Removal of Usurpers,) to give Leave to *these* Informers who now apply, to make Use of the

the King's Name and Suit, to call the Validity of this Franchise in Question.

Our Grounds are Three, taken together.

First—The Light in which the three *Relators*, now informing the Court of this Defect of Title, appear; from their Behaviour and Conduct relative to the Subject Matter of their Information, previous to their making this Motion. Reasons.
1.

Secondly—The light in which the Application itself manifestly shews their *Motives*, and the Purpose which it is calculated to serve. 2.

Thirdly—The *Consequences* of granting the Information. 3.

As to the First—The Objection does not lie in *their* Mouths. They all knew the Constitution of the Borough, before *Dawes* was elected; and They All knew He did not then reside: Yet Two of the Three *voted for him*; and All Three have voted *with him*, ever since the Year 1747; have *acquiesced* in his being a Jurate, ever since the Year 1756, and in his being twice Mayor; and have *assented* to many Persons deriving Rights under Him, *as if* He was duly qualified.

They come now to complain of their *own Iniquity*: They come to set aside Effects of which They Themselves have been the *Cause*. They come to desire They may represent the King, to prosecute Guilt of which They Themselves are *Partakers*. They have laid a Snare for the Corporation; drawn Them into Error; and, after having been Temptors, desire to put on the Character of *Accusers*. *Non tali Auxilio, nec Defensoribus istis*. The Cause of the King and Public, for the Usurpation of a Franchise, ought not to be trusted in *such* Hands.

Secondly—They shew no Right or Interest of their Own, or of any other Person, which depends upon invalidating the Title of *Dawes*: Therefore They can only inform as *Amici Curie*, or in general.

But the Objection is such, That so far as the *Borough* or the *Crown* is concerned, it has been substantially *cured*, ever since his Election. No new Constitution has been usurped on the Crown.

It is admitted, "that Residence is a *necessary Qualification*." But the *End* for which it was made a Qualification has been *fully answered* in the present Case, by his subsequent Conduct:
For,

For, He has resided, and executed all the Offices, ever since his Election.

It would therefore be acting with the utmost Rigour of the *summum Jus*, if the *King Himself* was to pry with Eagle's Eyes into such a Defect; and, certainly, ought not to be indulged, by this Court, to *private* Informers, ACCOMPLICES in the *Usurpation*.

Thirdly—The *Consequences* of granting the Information may be fatal to the Borough; and an Example thereby set, that Men may lie in wait, and lay a Scheme, for many Years, to draw a Corporation into Acts, which They may afterwards, for occasional and corrupt Views, turn to their Destruction.

The Parliament have intrusted Us with the Authority to give a private Informer *Leave* to prosecute the Usurpation of a Franchise, in the *King's* Name.

We are All clearly and unanimously of Opinion, “that THESE Informers *ought not to have that Leave*,” and “that it never ought to be granted to *any* Informers, who shall appear, under all the same Circumstances, in the *same unfavourable* Light.”

As to the Rule against *Thomas Marten*—The Application is for Leave to exhibit an Information against Him, that He may likewise shew by what Authority He claims to be a Freeman of *Winchelsea*.

The Objection is—That He did *not pay Scott and Lott*, at the Time of his Election.

The Case, upon the Evidence, appears to be this.—He was elected on the first of *October* 1753; He has, ever since, attended almost every Assembly of the Corporation; and He has, all along, *voted and acted* as a Freeman, *without* the least Objection to his Title. One of the Three Informers, now applying against Him, *consented* to his Election and *voted for Him*, with *full Knowledge*; and has voted *with Him* upon almost every Occasion since. And He has voted, upon *ten* several Occasions, *with the other Two*: Yet neither *They*, though they *then knew* the Objection now made, “that He was not rated,” (for They do not alledge it as a *new* Discovery,) nor *any other* Member of the Corporation, ever *questioned* his Right.

Besides a *Tenement* which He occupies, of 10*l.* a Year, He is seised of a *Freehold* Messuage and Land within the Borough: And by a Church-Rate made after the 1st of *October* 1753, He was

was *assessed* from *Easter* 1753, and *paid* such *Assessment*; and since his Election, He has constantly been *rated and paid*.

The Informers shew no Right in Themselves or any other Person, which depends upon invalidating the Title of *Marten*. No Question arises upon the Constitution of the Borough. The only Defect charged upon Him is, "the not being rated *at the precise Time* of his Election:" Which He *now is*, and has been ever *since*.

Many of the Reasons upon the former Case (of *Dawes*) hold in this: Though this Case is weaker than *Dawes's*. However, We are of Opinion that the Circumstances which shew this to be weaker, ought not to be nicely weighed; because they are opposite Applications; (They who defend *Dawes*, attack *Marten* :) And though the one Case is stronger than the other, yet the same Reasons ought to have the same Weight in both Cases; and they are enough alike to be connected in the same Judgment.

The Peace of the Borough is preserved, from Both, by the Exertion of that legal Discretion which is equally applicable for the Benefit of Both.

Therefore We are All of Opinion, That *Both* Rules ought to be discharged.

BOTH RULES DISCHARGED.

Rex *versus* Inhabitants of Tavistock.

This *Case* is already published in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 186. p. 578.

Rex *versus* Osborne.

THIS Indictment had been removed into this Court, by a *Certiorari*; and the usual Recognizance was thereupon entered into*. The Defendant was convicted, and fined 50*l*. and the Prosecutor had got a third Part of it, by an Order of two Judges, pursuant to the privy Seal.

PART IV. VOL. IV.

F f f

On

* V. 5 & 6
W. & M.
c. 11. § 2, 3.
made per-
petual by 8 &
9 W. 3. c. 33.

On *Thursday* the second of this Month, Mr. *Morton* moved for Directions to Me, to tax the Prosecutor's Costs under the Recognizance entered into upon the *Certiorari*; and had a Rule to shew Cause.

Sir *Fletcher Norton* shewed Cause. The Defendant has been fined 50*l*; and the Prosecutor has received one-third of the Fine. Therefore He can not have Costs under the Recognizance, over and above the one-third of the Fine.

The Words of the Act are —“that if the Defendant be convicted, the Court of King's Bench shall give *reasonable* Costs to the Prosecutor, if &c.” The Recognizance refers to the *Discretion* of the Court*: And the Court will not, in their *Discretion*, give Costs beyond the one-third of the Fine.

Mr. *Morton*—The Costs I apply for, are the Costs arising from the Removal of the Indictment by the Defendant. We are intitled to these Costs, *over and above* the one-third of the Fine.

He denied that the Costs under the Recognizance are *discretionary*: They are absolutely payable, by the express Words of the Statute—“the Court *shall* give.”

But THE COURT were of Opinion that the Prosecutor could *not* have *both* these Advantages; namely, the Costs under the Recognizance, *and* also the one-third of the Fine. They therefore made a Rule “that I should tax the Costs upon the Recognizance, according to the Direction of the Act of Parliament; and that so much as the Prosecutor has received for the one-third of the Fine be *deducted* out of the Sum allowed.”

Champion *versus* Gilbert.

ON *Thursday* the 25th of last Month, Sir *Fletcher Norton* moved that the Defendant might be discharged upon Common Bail; and had a Rule to shew Cause.

The Affirmation of the Plaintiff alledged “that the Defendant was indebted to Him in 5000*l*.” But it did not stop there; (which Sir *Fletcher* owned would have concluded Him:) It went on further, and added Words, which rendered it *unpositive*.

The Words of it were—“That the Defendant is justly and truly indebted to Him in the Sum of 5000*l*. for so much Money

“ Money had and received of this Affirmant, *and* for which He
“ has not accounted.”

THE COURT held, that these last Words rendered it not
positive. And therefore the Defendant was

DISCHARGED ON *Common Bail*.

Rex *versus* Castelman.

(*V. ante*, p. 2119.)

THE Order of Sessions being now removed hither by *Certiorari*, Mr. Cox, supported by Sir *Fletcher Norton*, moved to quash it; as not being within the *Intention* of the Act: It is a *negative* Judgment only. And They urged, that He had been five Years in Gaol; and had no other Creditor: And if He was not relieved now, He would be a Prisoner for Life.

Mr. *Baynham* objected to the *Certiorari*; it not being granted *within six Months* from the making the Order of Sessions; (for, it is now eighteen Months since;) and *no Notice* has been given to the Justices who made it: Both which Circumstances are required by the express Direction of the Act of 13 G. 2. c. 18. § 5. in order to the due and regular issuing of a *Certiorari* on a Proceeding before Justices of the Peace.

Per CUR'.—The Justices had no Authority to give this negative Judgment, “ That He is irrelievable.” ’Tis a Nullity: It is no Order at all. But there is no Difficulty, if the Justices at Sessions will act: He may be brought up again before Them; and They may make an Order of Discharge.

We can not meddle at present; because there is *no Notice* to the Justices; and therefore no *Certiorari* was grantable. The best Way is, to apply to the Sessions.

Welford *versus* Davidson.

AN Action had been brought in this Court; and Judgment obtained thereon. A Writ of Error was brought in the Exchequer-Chamber, upon this Judgment; and Bail given on bringing the Writ of Error: And the Judgment of this Court was affirmed in the Exchequer-Chamber. After which Affirmance, a *Scire facias* was brought here against the Bail. The
Bail

Bail pleaded Payment; and used all Methods of Delay: Whereby they staved off the Payment of the Money recovered, so long, that the *Interest* of it *exceeded* the Costs they were by the *ordinary* Taxation, to pay; and consequently they would be considerable *Gainers* by the Delay.

Mr. *Wallace*, on Behalf of the Defendant in Error, moved that the Master might allow the *Interest* of the Money recovered,

• V. 13 C. 2. in *Damages* *.

Stat. 2. c. 2.

§ 8, 9, 10. and ante, p. 1096.

LORD MANSFIELD—You cannot go back further than the *Judgment* in the Exchequer-Chamber: For, the giving or not giving Interest, to *that* Time, was the Province of the Court of

† See this Sub-*Exchequer* †.

ject very mi-

nutely discussed, in *Bodily v. Bellamy*, ante, p. 1097.

But the Master should allow Interest FROM *the Time of affirming* the Judgment by the Exchequer-Chamber.

The COURT made a RULE accordingly.

The End of *Trinity* Term 1767, 7 G. 3.

Michaelmas

Michaelmas Term

8 Geo. 3. B. R. 1767.

Rex *versus* Thomas Elkins.

Monday 9th
Nov. 1767.

THIS Man had been returned, by the Sheriff of *Wilts*, “guilty of a RESCUE;” (upon an Arrest on mesne Process :) And an Attachment of Course had issued against Him, *upon* that Return. He was taken thereupon, and had been confined seven Weeks in the County-Gaol of *Wilts*; and was afterwards bailed, to appear in this Court: Which He now did.

Upon *Friday* the first Day of this Term, Sir *Fletcher Norton*, on his behalf, proposed that the Court should immediately proceed to punish him, *without* going through the ordinary Course of his being examined upon Interrogatories; as no Denial by him, upon such Examination, could excuse him, after having been returned “guilty of a Rescue” by the Sheriff.

THE COURT were of this Opinion. They said, It would be giving an Opportunity to traverse the Return; which, in Case of a Rescue returned, could not be allowed. And accordingly, They ordered him to be brought up again on this Day.

And being now brought up, Sir *Fletcher Norton* cited an anonymous Case in 2 *Salk.* 586. where Sir *Samuel Astry* said “It was the constant Course, upon the Return of a Rescue, to set “4 Nobles Fine upon each Offender;” and “that He had it “from Mr. Justice *Twyfden* *.”

* And see Sir
T. Jones, 198.
the Case of

Penfold, Mariner, and Five Others, P. 34 C. 2. B. R. exactly agreeable thereto. Yet in Mich. 1739. 13 G. 2. B. R. Rex *v.* *Alway et al.* the Court set a Fine of only 6s. 8d. each; though Both these Cases were mentioned to them.

LORD MANSFIELD—That seems to be a strange Rule: It puts all Rescues, in all Cases and under all Circumstances, on the *same* Foot.

• Mr. Justice
Hewitt was
absent.

THE COURT * seemed inclined to have gone further in the present Case: But as the Man had already been seven Weeks in Prison; They only

FINED Him 5^l.

Tuesday 10th
Nov. 1767.

MEMORANDUM. On a Question—"Whether the Defendant had *till Tuesday*, to move in Arrest of Judgment; "or only till *Monday*;" that is to say, "Whether *Sunday* should or should *not* be reckoned as One of the Four Days allowed for Motions in Arrest of Judgment"—It was determined "that *Sunday* was *not* to be esteemed One of the Four Days: So that *Tuesday* was holden to be *within Time* to make such a Motion." And the Practice is the same, on *both* Sides of the Court; the Criminal, as well as the Civil.

Wednesday
11th Nov.
1767.

Rex *versus* Charles Malden.

(In the Crown-Paper.)

THIS was an Information in the Nature of *Quo Warranto*, to shew by what Authority He exercised the Office of Bailiff of *Malden*.

His Plea set forth Letters Patent of Incorporation 1 & 2 Ph. & Mary; which directs that the two Bailiffs should be annually elected, on the *Friday* next after the *Epiphany*: Which Bailiffs so elected, having afterwards taken their Corporal Oath before Two other senior Aldermen of the said Borough "well right-fully and lawfully to exercise their said Office for One whole Year," should be and remain in the said Office for One whole Year then next following.

He further pleads, that ever since the Grant and Acceptance of the Charter, at the Election and Nomination of Bailiffs on the *Friday* next after the *Epiphany* yearly, the Bailiffs for the preceding Year have presided, and have used and been accustomed and ought to preside.

That on *Friday* 6 G. 2. no Election was made of Bailiffs or a Bailiff. And that thereupon, on the *Day* next after it,

it, divers of the then Aldermen and Head-Burgesſes then having a Right to vote at the Election of the Bailiffs, and being the major Part of the then Aldermen and Head-Burgesſes, did, by Virtue of and in Purſuance of the Statute in ſuch Caſe lately made and provided, meet and aſſemble together in the Moot-Hall, for the Election of Two Bailiffs for the Year next enſuing; and then and there proceeded to ſuch Election: At which Meeting, He the ſaid *Charles Malden* (the Defendant Himſelf,) then and there being One of the Aldermen of the ſaid Borough, was preſent and did preſide; He the ſaid *Charles Malden* then and there having a Right to vote in that Election, and being then and there the *neareſt then preſent* in Place and Office to the Bailiffs of the ſaid Borough, and no Bailiffs or Bailiff of the ſaid Borough for the preceding Year being then preſent.

Then He ſhew~~e~~ his Election at this Meeting.

Then He ſhews, that after his ſaid Election, and before his Admiſſion into the ſaid Office or executing it, He did at the ſame Meeting take his Corporal Oath BEFORE *Jonas Malden William Smart* and *John Edwick* then and there being Three OTHER ſenior Aldermen of the ſaid Borough and the only Aldermen of the ſaid Borough who were preſent at that Meeting or Aſſembly, beſides Him the ſaid *Charles Malden*, “ well rightfully and lawfully to exerciſe his ſaid Office of “ One of the Bailiffs of the ſaid Borough for the ſaid Year then “ next enſuing;” and was *thereupon* then and there, according to the Form of the Statute in that Caſe made and provided, admitted into and did take upon Himſelf the ſaid Office. And ſo juſtifies and claims under this Election and SWEARING.

The King's Coroner and Attorney replies ſix ſeveral Matters; and, in his Reply, takes ſeveral Iſſues: One of which was, “ That *Jonas Malden William Smart* and *John Edwick* were not, nor was any of Them next in Place and Office to the Bailiffs.

The Defendant rejoins, That JONAS MALDEN, before whom (together with *William Smart* and *John Edwick*) He the Defendant took the ſaid Oath, was the neareſt, then preſent, in Place and Office, to the Bailiffs of the ſaid Borough, *except Him the ſaid Charles Malden*; who was the *neareſt, then preſent*, in Place and Office, to the Bailiffs of the ſaid Borough, and who preſided at the ſaid Aſſembly or Meeting, and who was elected and nominated to be One of the Bailiffs of the ſaid Borough, as in the Plea is mentioned.

The King's Coroner and Attorney demurs to this Rejoinder: And for One of his Cauſes of Demurrer He ſhews—That the

said *Charles Malden* ought to have taken his Corporal Oath "well
" rightfully and lawfully to exercise his said Office &c, for the
" said Year then next ensuing," BEFORE such Officer or Person as
PRESIDED at the Election as being the nearest then present at
such Election in Place and Office to the Bailiffs or Bailiff of the
said Borough for the preceding Year being then present.

The Defendant having joined in Demurrer,

Mr. *Wallace* argued for Him. But

THE COURT agreed that the Defendant was *not* properly
sworn in *before the PRESIDING Officer*: Which is absolutely
necessary where the Election is made *under the Statute of*
11 G. 1. c. 4*.

* V. ante,
Vol. 1.

P. 292, 303.

Rex v. Roger Philips, Mayor of Carmarthen, accord.

Mr. Justice ASTON cited *Rex versus Nance, Trin. 1741,*
14 & 15 G. 2. B. R. In which Case, the Court took Time to
consider; and the Resolution was delivered by Lord Chief Justice
LEE. They held, that the fourth Clause of that Act, (which
relates to swearing-in upon Elections made under the Statute,)
is general and positive (without any Exceptions or Restrictions)
" that the Officer shall take the Oath or Oaths by Law required,
" at the Time of his Admission, into such Office, BEFORE SUCH
" Officer as shall PRESIDE at such Election in Pursuance of the
" Act." There, the Court did not nor well could (as that
Case was circumstanced,) enter into a Question—" Whether He
" could be sworn in before *Himself*." Neither, indeed, is it
necessary to determine it here; because it is *not alledged* " that
" He was sworn in before Himself:" It is only alledged " that
" He did, at the same Meeting, take his Corporal Oath before
" *Jonas Malden William Smart and John Edwick*, then and
" there being three other Senior Aldermen &c."

Per CUR'. unanimously—

JUDGMENT *pro REGE*; (because there was no proper
Swearing-in.)

V. post, (in this Term,) *pa.*

. *Rex versus Jonas Malden.*

Sharpe,

Sharpe, qui tam, *versus* Law.Tuesday 17th
Nov. 1767.

UPON a Case reserved at *Nisi prius* at Guildhall, before Lord
MANSFIELD,

THE COURT held that the Statute of 22 H. 8. c. 42. continued in force, as to the *Barbers*; notwithstanding that of 18 G. 2. c. 15. which separates them from the Surgeons. The latter Statute only means to dissolve the *Union* between the two Companies.

Dale *versus* Sollet.

THIS was an Action for Money had and received to the Plaintiff's Use: *Non Assumpsit* was pleaded; and Issue joined.

CASE—The Defendant, a Ship-Broker, was the Plaintiff's Agent in suing for and recovering a Sum of Money for Damages done to the Plaintiff's Ship; and did recover and receive 2000*l.* for the Plaintiff's Use; and paid Him all but 40*l.* which He retained for his Labour and Service therein; which the Witness (Mr. Fuller) swore He thought to be a reasonable Allowance. And the Jury were of Opinion "that the Defendant ought to retain 40*l.* as a reasonable Allowance." Consequently, the Plaintiff was not intitled to recover.

The Plaintiff objected, at the Trial, "That the Defendant could not give *Evidence* in this Manner, of this Labour and Service; but *ought to have* PLEADED it by Way of SETT-OFF, or at least have given *Notice* of it as a *Sett-off*."

A Verdict was found for the Plaintiff; subject to the Opinion of this Court: And if the Court should be of Opinion against him, then Judgment to be entered as upon a *Non-suit*.

Accordingly, on *Tuesday* last, (the 10th Instant,) Mr. *Dunning* moved on behalf of the Defendant, "that Judgment might be entered against the Plaintiff, as upon a *Non-suit*;" and had a
RULE to shew Cause.

Sir *Fletcher Norton*, on behalf of the Plaintiff, now shewed Cause; and insisted that the Defendant ought either to have
PART IV. VOL. IV. H h h pleaded

pleaded it, or given *Notice* of a Sett-off: But that he could not take Advantage of it in *this* Manner, *without* either Plea or Notice.

Lord MANSFIELD had no Doubt of the Defendant's being at Liberty to give this Evidence.

This is an Action for Money had and received to the Plaintiff's Use. The Plaintiff can recover no more than he is in Conscience* and Equity intitled to: Which can be no more than what *remains after deducting* all just Allowances which the Defendant has a Right to retain *out of the very Sum demanded*. This is not in the Nature of a *Cross-Demand* or *mutual Debt*: It is a CHARGE, which makes the *Sum* of Money received for the Plaintiff's Use so much *less*.

* V. ante,
p. 1010, 1011,
1012.

The Two Other JUDGES concurred.

Per CUR'.

JUDGMENT for the Defendant, as on a NONSUIT.

Bailley *versus* Smeathman.

Wednesday
25th Nov.
1767.

ON *Tuesday* the 10th of this Month, Mr. Cox moved to stay Proceedings on the *Scire facias* against the Defendant's Bail, *with Costs*; the Defendant having surrendered Himself in Discharge of his Bail in due Time.

The Action was by *Original*. The Bail surrendered their Principal, within the *Appearance-Day*, but not till *after* the *Return-Day*. Mr. Cox insisted, that this Surrender on the *Appearance-Day* was a Surrender within due Time, as the Action was by *Original*.

He said it was the Course in *C. B.*; and had been also so determined in this Court. Whereupon He had a Rule to
SHEW CAUSE.

And Master Owen now certified, that where the Action is by ORIGINAL, this Court proceeds by the same Rule as *C. B.* does; *viz.* that the Bail has till the *quarto Die post* (provided it be done *sedente + Curia.*)

* See Barnes's
Notes 4to
Edit. p. 66.

Mason v. Bruce, and p. 75. Hanley v. Page.

Lord

Lord MANSFIELD—It is therefore regular.

RULE made ABSOLUTE; except as to the Costs.

Rex *versus* Jonas Malden.

Friday 27th
Nov. 1767.

UPON an Information in the Nature of *Quo Warranto*, to shew by what Authority the Defendant claimed to be Bailiff of *Maldon*, several Issues were joined; and the Cause was tried before Mr. Baron *Smythe*, at the last *Essex*-Assizes.

It came on, Yesterday, upon the Judge's Report, in Consequence of a Rule that had been granted upon the Motion of Mr. Serjeant *Leigh*, on *Monday* the 9th Instant, to shew Cause why the Verdict should not be set aside and a new Trial granted: Which was the Method thought the most proper, by the Court, for doing full and complete Justice upon the Points in Question.

There were, in all, five Issues: But the two first were quite out of the Case *. The present Question turned upon the third, fourth and fifth Issues; which were found for the Prosecutor, by the Baron's Opinion; but were, at the Trial, agreed to be subject to the Opinion of this Court; the Judge giving the Defendant Leave to move for a new Trial, without Payment of Costs.

* See the Case of Charles Malden, ante, p. 2130.

The COUNSEL for the Prosecutor were Sir *Fletcher Norton*, Mr. *Eliab Harvey*, Mr. *Morton*, and Mr. *Asburst*. They argued, that no new Trial ought to be granted, there being sufficient Issues found, and now before the Court, upon which the Court might proceed to give Judgment against the Defendant.

The third Issue is upon his being *duly elected*; viz. "Whether the *Aldermen* and *Head-Burgeses* assembled the Day after the *Charter-Day* did elect Him:" which was directed and found against the Defendant. On this Issue, the first Objection was, That there was *not a sufficient Number* of Aldermen; Two of them *not being Aldermen* at the Time of his Election: And those Two appeared upon the Evidence, *not* to be Aldermen; for, there was *no presiding Officer* at their Election. This goes to the Root of his Title.

The fourth Issue, upon the *Swearing*, was also a material Issue; viz. "Whether *Smart* and *Edwick*, before whom He took the Oath, were Aldermen." The Jury have found "that they were *not*." The Judge admitted Evidence to be read of the Entry of their Election to be Aldermen; and held it to be void.

void. They object, "that He ought not to have admitted it; " and that it was not sufficient Evidence." This Entry entirely cut up the Title They had insisted upon by their Plea: For, it proved "that *no Bailiff* was present at their Election." And this fourth Issue applies to the third Issue, as it shews "that He " was not duly elected; they not being Aldermen at the Time " of his Election." The fifth Issue was—"That *Jonas Malden* " was not Bailiff." Which, they said, was a substantial Issue, and ought to have been fully and completely proved.

The Counsel who argued on behalf of the Defendant, were Mr. Serjeant *Leigh*, Mr. *Thurlow*, Mr. *Cox*, Mr. *Dunning* and Mr. *Wallace*: And their Arguments were to the following Effect.

It is found "That *Charles Malden* was the *proper presiding Officer*: Also "That a *Majority* of the Aldermen and Burgesses was *present*; and "That the Majority of the whole Assembly made the Election." Also, "That He was *sworn before Charles Malden the presiding Officer*;" (although it was *also before Two Others*, who had *no Authority* to swear Him.) But the Swearing is not void, by being taken before the proper Person *and Others*. The Law will refer the Act to Those who had the Power to administer it. This is the Case of all *Authorities*. 5 Co. 89. b. *Hoe's Case*.

In the Case of *Soulby* versus *Hodgson*, (*V. ante*, Vol. 3. p. 1474) on an Award, the Umpire and two Arbitrators joined in the Award, though the Authority of the Arbitrators was expired: The Court held that it should be referred to the Umpire who had the Authority; yet was at Liberty to take what Advice or Opinion He pleased.

The third Issue relates only to the Election. And as He *was* duly elected, *that Issue* ought to have been found for the Defendant. A Majority of those in whom the Right of Election resided, did concur in the Election; even supposing that these two Persons were *not* Aldermen. But they were Aldermen; at least, *de facto*: And in a *derivative Title*, it is sufficient, that they were in *Possession*, under *Colour* of a Title. And "that they " were so," is proved by the Entry in the Corporation-Book, of their Election and Admission. It is objected, that this Entry does at the same time prove "that they were *not so de jure*." The Answer is, That the Issue is here upon the *Possession*, not upon the *Title*; and Nothing more is necessary for Us to prove. However, this Entry does not prove "that the Bailiffs were *not* " present at their Election:" They might have been present in fact;

fact; though their being so is not entered in this Minute. It is enough, that they were proved to be Aldermen *de facto*.

The fourth Issue is "Whether the two Persons before whom " He was sworn, were Aldermen." The Swearing is alledged to be before *Charles Malden*; whom the Court must *see to be* the presiding Officer, as He is alledged to be the *senior Alderman*: And although We have not indeed expressly alledged " that He " *was* the presiding Officer," yer it appears " that the Oath was " administered *before Him* and the Other Two;" and the only Issue is taken " That the Other Two were *not* Aldermen." But if They were not; yet He was sworn before *Charles Malden the presiding Officer*. The Election is quite different from the Swearing: The former is to be made by the Bailiff Aldermen and Head-Burgeses or the major Part of them; the Swearing is to be before the presiding Officer. And He was sworn before *Charles Malden*, who was so. Therefore He was *properly* sworn.

Consequently, He was *both elected AND sworn*, in a *proper* Manner.

As to the fifth Issue—It is either a *substantive* Issue, or a *consequential* One.

If a *substantive* Issue—Then He was *well* sworn before *Charles Malden*, the then presiding Officer: For We were not precluded from giving Evidence to prove it; as the Defendant was in the Case of *Rex versus Roger Philips**, who having pleaded an im-
proper Swearing, could *not* be permitted to give such Evidence
as would prove a proper Swearing, which He had not pleaded.
Here, We might have given Evidence that *Charles Malden* was
the presiding Officer, and that we were sworn before *Him*.

* V. ante,
Vol. 1.
P. 292.

If this is a *consequential* Issue—The only Question will be,
" Whether the Swearing before *Charles Malden*, who is *confessed*,
" upon the whole Record, to have Authority to administer the
" Oath, was faulty for being administered before two other Per-
" sons also, who had *not* such Authority."

But, at the worst, It clearly appears upon the Record " That
" He was sworn *before the proper* Person," though perhaps We
may not have pleaded it properly. Here is *no Defect* of Title:
It is a Title; *only, defectively set out*. So that it is stronger than
Roger Philips's Case. The Court will not suffer Matter of Form
to prevail against substantial Right; especially, where the *Ex-
istence* of the Corporation depends totally upon it.

If complete Justice is to be done, We ought to have Liberty to amend our Plea, and to have a new Trial: And then They may take what Issues They think proper.

Mr. *Morton*, for the Prosecutor, in Reply, argued that there ought not to be a new Trial. He insisted that the third Issue is complicated with the fourth and fifth; and that *Charles Malden* ceased to be an Alderman, when He was elected Bailiff; and that consequently there was but *One* Alderman present, if *Edwick* and *Smart* were *not* Aldermen: Therefore the fourth Issue was material. And upon the fifth Issue (which is a substantial Issue) We might have called upon Them to shew *all* the Essentials that constituted Them Aldermen; (as a good Election, a good Swearing, taking the Oaths to the Government &c, and also the Corporation and Test-Acts.) And the Prosecutor has a Right to avail Himself of every thing that the Defendant has confessed upon the Record.

Now here is such a Swearing pleaded, as was no Swearing at all: And we had a Right, on the fifth Issue, to call upon Him to shew a proper Swearing. He ought to have been sworn *before the presiding Officer* at the Time of his being chosen: Whereas it appears by his own Confession, that He took the Oaths before *Charles Malden* and the Two Others, As *Aldermen*.

In the Case of *Rex versus Roger Philips*, there was in fact no such Swearing as was pleaded: But here the Swearing really was as it is alledged; which must always be bad, both upon Plea and upon Evidence. No Evidence can make such a Swearing good: It was before these Three, as *Aldermen*.

LORD MANSFIELD—It appears by the Report, that there were but Two Objections made at the Trial of this Cause, and Two Questions started; viz. “Whether the Swearing could be before the Three *Aldermen*; and 2dly, “Whether *Edwick* and “*Smart* were Aldermen, for the Purposes of swearing Him in:” And it was then agreed by the Counsel, to be put upon that Foot.

But the Whole of the Litigation as to the Two Aldermen was immaterial: For, They had Nothing to do with it.

The Election and the Swearing are distinct Matters.

The Swearing is *not* involved in the Issue concerning the Election.

The

The fifth Issue is only consequential. In the Case of *Roger Philips*, the Election under the presiding Officer could not be gone into: For, He had not alledged that He was sworn in that Manner.

At the Trial of the present Cause, the Election was not at all objected to, upon the Foot that has been *now* insisted on. Why was He not duly elected? It is now said—"because Two of the "Electors were not Aldermen." But Nothing was laid before the Court at the Trial, how many Aldermen were necessary to be present; or how many were actually present. It is not shewn on the Evidence, that there was not a Majority of the Aldermen present.

It is not to be taken for granted, that the swearing before *Charles Malden*, as presiding Officer, could have been given in Evidence upon the fifth Issue. But, however, (stripped of the Pleading,) The Question has never been before the Jury: And the Matter is now brought improperly before the Court.

In the Case of *Philips*, the Defendant alledged a Swearing, which was not in fact true: And the Finding and Direction in that Case were Both right. Therefore They could not properly move for a new Trial, but applied for setting aside the Verdict, * V. ante, and a Repleader *. The Court thought that setting aside the p. 295. Verdicts, and giving the Defendant Liberty to amend his Plea, † V. ante, was a better Method †: And that Method was accordingly p. 304. there taken ‡. ‡ V. ante, p. 306.

If We grant a new Trial here, They will have it in their Power to apply for an Amendment or not, as They think proper.

If the Swearing was in fact an improper Swearing, that will appear upon the Record: And Judgment could not in such Case be for Him; because his Title would appear to be a defective One.

Therefore—Let there be a new Trial, *without* Costs.

Mr. Justice ASTON said, He could not conceive how the third Issue could be found against the Defendant.

How does it appear upon this Record "that *Charles Malden* "and *Jonas Malden* were not the Majority of the Aldermen for the Time being?" It does not appear but that They Two were the only existing Aldermen: And it does not appear but that the Defendant was well elected.

The Swearing is a quite different Matter from the Election. The Defendant is obliged to shew a complete Title: And He here concludes, that "so He had a good Title." The King's Coroner may traverse all the Particulars, if He thinks fit: But if He does not, All that is well pleaded by the Defendant is admitted.

The Defendant has here alledged that He took the Oaths before the presiding Officer; though indeed He adds—"and before the Two Others," (who were not so.)

On the fifth Issue, which is consequential, the Prosecutor can not give in Evidence Defects of Title not mentioned in the Pleadings.

Therefore if the Issue upon the Election is found wrong, that Issue is also found wrong.

Whether They will apply to amend or no, is no part of the present Consideration: They may do as They think proper. But I think We ought to set aside this Verdict, and grant a new Trial.

The Case of *Philips*, Mayor of *Carmarthen*, was not like this Case.

* *Rex v. Lisle*,
2 *Stra.* 1090.

In *Goldwyer's Case* *, the Fact of the Person presiding being a good Mayor, or only a Usurper, was put in Issue: And though the Court did not give an explicit Opinion "whether the presiding of an Officer *de facto* was sufficient to make a Title in the Defendant against the Crown," yet if He had been an Officer *de facto*, (and not a mere Usurper,) they strongly inclined that the Presence of a Mayor *de facto* recently prosecuted, and against whom Judgment of *Ouster* had been obtained, would *not* be sufficient to authenticate the Defendant's Election.

But I give no Opinion on this Point.

He thought that a Swearing before *Charles Malden* as presiding Officer could not be given in Evidence on the last Issue, as the Pleadings now stand.

† The Other
Two Judges
were Both
absent.

Upon the Whole, He concurred with Lord MANSFIELD †, That there ought to be a new Trial.

RULE MADE ABSOLUTE for setting aside the Verdict, and having a New Trial.

Jeffer

Jeffer *versus* Gifford.

THIS was an Action for erecting a Wall, whereby the Plaintiff's Lights were obstructed.

The Declaration contained Two Counts: In the Second, the Plaintiff counted as the *Reversioner*. And a Verdict had been given for the Plaintiff, and *general* Damages.

On the second Day of this Term, Mr. Serjeant *Burland* moved in Arrest of Judgment; and had a Rule to

SHEW CAUSE.

His Objection was—that this Action will not lie by a *Reversioner*; being only an Injury to the Person in *Possession*.

Mr. Justice ASTON now said He had looked into it, and had found a Case S. P. with the present; and accordingly cited *Tomlinson versus Brown*, as of H. 28 G. 2. but it was determined in *Easter Term* 1755. It was an Action brought by the Owner of the Inheritance, for a Nuisance in obstructing Lights and breaking his Wall. A general Verdict for the Plaintiff. Mr. *Norton*, in Arrest of Judgment, objected, that a temporary Nuisance can't be an Injury to the Inheritance: It may be abated before the Estate comes into Possession: And he cited *Cro. Jac.* 231. *Some versus Barwish*; and observed, that if this would hold, the Defendant would be liable to a *double* Action; One, by the Possessor of the Estate; the Other, by the Reversioner. Mr. *Crowle* shewed Cause on behalf of the Plaintiff; and insisted that it was a Damage done to the *Inheritance*: If the Reversioner wanted to sell the Reversion, this Obstruction would certainly *lessen the Value* of it. The Court were of Opinion, that an Action might be brought by One, in Respect of his Possession; and by the Other in Respect of his Inheritance, for the Injury done to the Value of it.

LORD MANSFIELD—That is decisive.

WHEREUPON,

The RULE was DISCHARGED.

Rex *versus* Norris.

SIR *Fletcher Norton* moved for a Rule to bring up the Defendant to be *discharged* as an *Insolvent Debtor*.

He had been convicted of *Perjury*; and (*inter alia*) *fined* 100*l*.

Lord MANSFIELD—This is not a *Debt*, but a *Punishment*.

MOTION DENIED.

The End of *Michaelmas* Term 1767, 8 G. 3.

Hilary

Hilary Term

8 Geo. 3. B. R. 1768.

N. B. There were only Three Judges of this Court, at the Opening of this Term; viz. LORD MANSFIELD, Mr. Justice YATES, and Mr. Justice ASTON: The Fourth Seat was vacant, by the Promotion of LORD LIFFORD to the Chancellorship of *Ireland*; and Mr. Justice WILLES, who succeeded him here, did not take his Place upon this Bench, till the 27th of this Month. Saturday 23d
January 1768

Rex *versus* John Leigh Esq. Mayor of Yarmouth in the Isle of Wight.

MR. Serjeant *Burland* shewed Cause, on behalf of the Prosecutor, against a Rule which had been obtained by Mr. Serjeant *Davy* (on Monday 9th November 1767,) to shew Cause why the Judgment against the Defendant should not be arrested.

It was an Information in Nature of a *Quo Warranto*. Twelve Issues were taken: Five of them were withdrawn by the Prosecutor.

The Defendant claimed the Office under two *Titles*; viz. under a *Prescription*, and also under a *Charter*: But He had, by his Plea, put his Defence upon his Claim under the *Prescriptive Right*; which was tried, and *found against* him.

Serjeant Davy alledged, that it appeared upon the Face of the Record, taking in the Whole of the Pleadings, "that the De-
" fendant

“ fendant had a *good Title* under the CHARTER :” And therefore if he could not have Judgment *for* him, yet at least there could be no Judgment *against* him, notwithstanding the Finding of the Jury upon his prescriptive Claim.

He insisted, that though it had been objected “ that the Defendant had put his Defence upon a Title under a Prescription ;” yet it appears upon the *whole Record* “ that He *had a Title* :” For He has alledged “ that He was chosen by a Majority of those *who assembled* upon the Charter-Day.” And the Charter appears upon the Record: And upon the *Construction of it*, it was not necessary that He should be chosen by a Majority of the whole Number of the Electors *in being*.

To this Serjeant *Burland* answered, That the Defendant *can not go into the Construction of the Charter* ; because, upon this Record, the Defendant *found his Title upon Prescription* ; and *denies the Charter* : Therefore, as the prescriptive Title is found *against* him, He can not resort to the Charter, of which He has *denied the very Existence*.

Serjeant *Davy* replied—That the Defendant does *not* found his Title upon Prescription *only* ; (though He acknowledged “ that He *denied the Acceptance* of the Charter :”) But upon the *whole Record*, it plainly appears that there was a Mode of Election directed by the Charter ; and that He was elected agreeably to the Directions of it ; and therefore there ought to be either an *Arrest of the Judgment*, or an Award of a *Repleader* on Account of the Immateriality of the Issues.

LORD MANSFIELD (to Mr. Serjeant *Davy*—) It is too strong for you. You have departed from the Title you have set up : And the Issues are not immaterial. The Judgment must follow the Title set up by the Defendant against the Crown : He can not say, in general, “ That “ He was *duly* elected.”

Mr. *Thurlow* and Mr. *Walker*, who were also Counsel (with Serjeant *Davy*) for the Defendant, still urged that the Court could not give a positive Judgment against the Defendant, when it appears to Them upon the Face of the whole Record, “ that the Mover of “ the Suit has no Cause to sustain it ;” not even if the Defendant should *confess* the Action. And to prove this, they cited the Opinion of *Choke* Chief Justice, in * *Tilly and Wody's Case*, 7 Ed. 4. 31. “ that in *no Case* where it appears that a Man has no Title to “ recover, shall He ever have Judgment to recover. And even “ if the Defendant would in such Case suffer Judgment, yet the “ Court ought not to give it : For, they never ought to give “ Judgment,

* Note. This Case is often erroneously cited, with Regard to the Year and Page: 7 E. 4. 31. is the Truth.

“ Judgment, but where it appears to them that the Plaintiff
 “ has Cause to have Judgment.”

And this Reasoning is equally applicable to Informations in Nature of *Quo Warranto*, where the Crown appears to have no Cause of Suit, as it is to a Plaintiff who has no Title to recover.

They also cited Dr. *Bonham's Case*, 8 Co. 114 & 121. b. as laying down the proper Distinction; and which is express “ that the
 “ Plaintiff shall *never* have Judgment, when it appears that He has no Cause of Action. So also is the Case of *Butterfield* versus *Marshall*, in 1 *Lutw.* 608. The Chief Justice says—“ That admitting the Bar not to be good, yet in as much as it appears
 “ that the Plaintiff, by his own Shewing, has no Cause of Action, he cannot have Judgment:” And so was the Opinion of the whole Court. p. 609.

Turnor's Case, 8 Co. 133. b. was also cited by them, as laying down and confirming the same Doctrine; and proving that if a Defendant pleads an insufficient Bar; and the Plaintiff goes on, and shews that the Bar is insufficient, and that the Defendant has no Title; yet He shall not recover, if it appears upon his Replication “ that He has no Cause of Action.”

Here, the Defendant has pleaded a *prescriptive* Title; which is fallen to the Ground: It is found against Him. But it appears upon the Record, “ That there was a regular Assembly
 “ holden; and that the Defendant was duly chosen a Chief
 “ Burgess at it; and afterwards, duly elected and sworn Mayor.” This would have been a Title under the Charter, which is set forth upon the Record. Therefore Judgment can not be given for the Prosecutor: For, the Court sees, upon the Whole, that the Party who prays this Judgment *has no Title to it.* The Charter is set forth in the Replication: And the Defendant appears to have been elected agreeable to it. All this *appears* upon the Record.

Mr. *Walker* cited some Cases of the Court's having awarded Repleaders after Verdict; particularly, *Love* versus *Wotton*, in *Cro. Eliz.* 245. and an anonymus Case in *Comyns* 148. and the Case of *Roger Philips*, Mayor of *Carmarthen*, (*ante*, Vol. 1. p. 292.) And He proposed, that the Defendant should have Liberty to amend his plea, or to plead *de novo*, on Payment of Costs.

Lord MANSFIELD asked if They could cite any Case where Judgment had been refused to the *Crown* upon an Information

mation in Nature of *Quo Warranto*, where the *Defendant* failed in the *Title* He had set up.

And it seemed acknowledged, that there was *None*. At least, *None* were mentioned.

Whereupon HIS LORDSHIP proceeded to observe, that in Civil Cases, if the Plaintiff has no Cause of Action, He can not have Judgment.

But *this* Manner of proceeding is quite different. For if the Defendant has usurped the Franchise without a Title, the King must have Judgment. The Defendant therefore is obliged to shew a Title: And the King has no Need to traverse any Thing but the Title set up. If any One material Issue is found for the Crown, the Crown must have Judgment.

He added—

I do not see how here could be a Repleader: For, in Repleaders, you begin with the first Fault. Now here, the *whole* Defence is wrong. And there don't appear to be any Slip or Mistake: Nor has there been any Motion for an Amendment or Repleader in this Case.

In the present State of it, I have no Doubt that you cannot stop the Crown from having Judgment.

Mr. Justice YATES—If the Plea contains no Title against the Crown, there must be Judgment *for* the Crown.

In Civil Actions, the Plaintiff must recover upon his own Title: In Cases of Information in Nature of *Quo Warranto* for Usurpations upon the Rights of the Crown, the Defendant must shew that He *has* a good Title against the Crown.

Sir Fletcher Norton, *pro Rege*, here observed, that the Court could not grant a Repleader: For, that would be giving the Defendant an Opportunity to *plead double*; which the * Act of Parliament disallows.

* See 4 & 5 Ann. c. 16. sect. 4. and

9 Ann. c. 20. sect. 7. which extends the former to "all Writs of Mandamus, and Informations in Nature of a *Quo Warranto*, and Proceedings thereon, for any the *Matters in the latter Act mentioned*:" But not so as to have Liberty to plead *more Pleas than One*, even with Leave of the Court. This was determined in Trinity Term 1753, 26 & 27 G. 2. B. R. in Two Cases: One, *Rex v. Newland*, Common-Council Man of Carmarthen; the Other, *Rex v. Briscoe*, Bailiff of Haslemere.

Lord MANSFIELD—And in the worst Way, too. This is decisive.

Mr.

Mr. Justice YATES proceeded—The Defendant in *Quo Warranto* is called upon to shew his Title; to shew “*Quo Warranto* He claims the Franchise.” He accordingly shews his Title. The Crown are only to answer this particular Claim. He must at once shew a *complete* Title. If He fails in it, or in any Chain of it, Judgment must be given against Him. Here, the Defendant has set up a particular Title: This Title, upon which He grounds his Claim to the Franchise, is found against Him. He can not *now* depart from it. Therefore the Crown is here intitled to Judgment.

Mr. Justice ASTON concurred in Opinion; and had no Doubt at all. There could be no Pretence, He said, of Judgment *for the Defendant*: For, it don’t appear that He could have made a Title, at all; and that which He set up, is found against Him.

In the Case of *Rex versus Philips*—It was only a *defective setting forth* of the Title: He really had a good One.

Per CUR.’

RULE DISCHARGED.

See the Case immediately following this Case.

Rex versus Grimes.

Rex versus Blatchford.

(See the last Case.)

Monday 25th
Jan. 1768.
(All Three
Judges present.)

SEVERAL other Corporators having pleaded the like Pleas as in the Case immediately preceding this; and the Issues having been ready to go down to Trial at the same Assizes with the former, but *not* having been actually tried; the Defendants had moved to withdraw their Pleas, and to plead *de novo*, on Payment of Costs and the Prosecutor’s having Liberty to reply *de novo*. Cause was now shewn against this. But

THE COURT granted it, without even hearing (a second Time) the Counsel for the Defendants; upon Payment of Costs, pleading within a Week, taking short Notice of Trial, and with Liberty to the Prosecutor to reply *de novo*.

And this they did, *without* Affidavit of any particular Circumstances, or any particular Reasons given for this Amendment: For, *Lord Mansfield* said it was sufficiently hard upon a Defendant, who might be doubtful “whether his Election could be best supported under a Charter or under a Prescription,” to be *obliged* by our Law, to make his Election under *which* of them He would defend Himself by his Plea, and to *desert the other Title*, instead of having an Opportunity to take the Benefit of *Both*: But it was surely reasonable that if He discovered, *before Trial*, that He had pitched upon the *wrong* Defence, He should be at Liberty, upon Payment of Costs and other proper Terms, to *quit* that weaker Defence, and *insist upon* the Other which would better *support* his Claim to the Franchise.

The RULE was made ABSOLUTE, with the Additions above particularized.

Tuesday 26th
Jan. 1768.

Dally *versus* Smith.

A Question was reserved at *Nisi prius*, (by giving the Defendant Leave to move to set aside the Verdict, and enter a Judgment of Nonsuit thereupon,) “Whether a BUTCHER was a Person who *sought his Living by buying and selling*, within the Meaning of the Acts concerning Bankrupts.”

THE COURT, though they expressed themselves very sensible of the *Inconvenience* of extending the Bankrupt-Laws to *Artificers* whose Living is substantially gotten by *mechanical Labour*, with a *Mixture* of buying and selling; yet thought, upon the Authority of *Cases*, that they *must* hold a Butcher to be within that Description which makes a Man liable to a Commission of Bankruptcy.

And therefore

THE RULE for shewing Cause “why the Verdict should not be set aside and a Judgment of Nonsuit entered,” WAS DISCHARGED.

V. 13 Eliz. c. 7. 1 J. 1. c. 15. and 21 J. 1. c. 19.

See also *Cro. Car. 31. Crampe versus Barne.*

Barnes *versus* Foley.

THIS was a special Case reserved at *Nisi Prius*, upon the Trial of an Action brought by an Inhabitant of *Bath* against the Defendant who demanded, and received of him, a Half-penny a Letter more than the settled Rate of Postage.

The Point meant to be settled, was “whether the Post-Master was obliged to *deliver out* Letters sent by the General Post, *at the respective* HABITATIONS of the Persons residing in that City to whom such Letters were addressed, for the mere Rate or Price settled by Act of Parliament:” Or “Whether it was incumbent upon such Persons, to *come or send* to the Post-Office, to inquire after and *fetch* their Letters, in case they insisted upon not paying any more for them than the strict Rate allowed by Act of Parliament, *and refused to make any Compensation* whatsoever for the *Trouble of carrying them out and delivering them at their respective Habitations.*”

It happened, nevertheless, that this Point still remained unsettled; as the present Action was brought for the *Recovery of the Money* which had been illegally demanded and taken, (which could not be justified;) and not for the *injury of detaining* the Letters, and refusing to carry out and deliver them.

Perhaps, therefore, it is scarce necessary to state more of this Special Case, than that it appeared therein, that the Post-Master of *Bath* had published an Advertisement, “that such Persons as chose to *SEND to the Post-Office* there, for their Letters, might have them *delivered THERE*: But such Persons as chose to have them delivered *at their own Places of Habitation must PAY a HALF-PENNY for EACH Letter so delivered at their Place of Habitation.*”

However, though I have not the exact literal State of the Case at present in my Possession, I mean to insert it hereafter; and shall specify the particular Page where it will be inserted, both in the *Index* of Names of Cases, and also in the *Table* of the Principal Matters, under Title “Letters.”

It was argued, on *Friday* the 15th of *May* 1767, by Mr. *Mansfield* for the Plaintiff, and Mr. Serjeant *Davy* for the Defendant.

THE GENERAL QUESTION was, “Whether the Post-Master was obliged to *deliver* Letters to the Inhabitants of and Resi-
PART. IV. VOL. IV. M m m “dents

“ dents in *Bath*, at their *known Places of Abode*, at the Rate
 “ fixed by the several and respective Acts of Parliament; or can
 “ demand a further Consideration or Compensation for the Labour
 “ of so carrying out and delivering them:” For, as to the particular Sum demanded, (a Half-penny,) it was not objected to as unreasonable, in case He had a Right to make any Demand at all.

Mr. *Mansfield* argued that He was obliged to deliver the Letters abroad, at their respective Habitations, at the fixed Rate, without any additional Charge.

He confined Himself to the Delivery of Letters within the *Post-Towns*; not meddling, at present, with the Delivery of them at a Distance from such Towns. He cited rehearsed and observed upon the different Acts of Parliament relating to the Post-Office. The 12 C. 2. c. 35. was the first Act to erect a Post-Office. Then came the 9 Ann. c. 10. of which He selected the following Sections, viz. § 6, 17, 22, 31, 39, 40. The 4 G. 2. c. 33. gives the additional Penny to the Penny-Post. And 5 G. 3. c. 25. § 4 & 13. expressly mentions where any additional Charge is to be made. And no other, He said, could be imposed without legal Authority.

He then argued from the great Inconvenience that must arise to every Person that might have Reason to expect Letters; in Case the Post-Master was under no Obligation to send them out to their respective known Habitations; and the infinite Confusion that would happen even at the Post-House itself, in populous Towns, from the Crowds of Inhabitants continually resorting there to inquire for Letters. And He argued that the particular Rates and Payments fixed by the sixth Section of 9 Ann. c. 10. and the Caution of 4 G. 2. c. 33. about the additional Penny, and of the 5 G. 3. c. 25. where any additional Charge is to be laid on, shew it to be the Intention of Legislature, that no such Encroachments should be made, as are now attempted: At least, a strong Presumption arises from them. And the Smallness of the Sum at present demanded would make no Difference in the Case. But, however, a Half-penny bears a great Proportion to the whole Rate (of 3d. or 4d.) It may, in some Places, amount to 400l. or 500l. a Year. And if They have the Power to demand any Thing at all, it will be in their Power to increase it *ad libitum*; and so to raise a Tax upon the Subject, at their Discretion.

Mr. *Serjeant Dary*, *contra*, for the Post-Master, insisted that it is no Part of his Duty to carry the Letters a Yard further than the Post-Office of the respective Post-Town. He owned this to be

be a Point defended by the *Post-Master-General*; and that it was considered as a *general Question*, *not confined to Bath* alone.

Many Post-Offices are in exceeding small Villages; not in large Towns. These would be clear of the Inconveniencies suggested as possible to happen in populous Places.

The Post-Office *may* indeed send them out, if They think it to their Advantage: And it would be very inconvenient in *London*, not to send them out. Many Merchants of *London* do, however, fetch their own Letters. But in Country Towns it might be exceedingly inconvenient to the Post-Master, to send out Letters to considerable Distances from the Post-House.

He mentioned 9 *Ann. c. 10. § 6, 11, 31.* and 5 *G. 3. c. 25. § 8.* as favouring his Side of the Question; and observed, that the Words "*Office*" and "*Stage*" are used as synonymous Terms, through all the Acts; that the Rates are settled according to the Distance in Miles; and that the Miles are computed from Stage to Stage. Now if a Man lives, in a great Town, somewhat farther from *London* than the Post-House of such Town, He ought *not* to have his Letters *sent* to Him at such his Habitation, unless they were to be charged *more* than He would be obliged to pay if He *sent to the Office* for them.

This same Question has been tried before, in a Case between *Green* and *Hopper*, in *Durham*, at the Summer-Assizes 1761. And the Judge, after Argument, determined "that it was *not* " the Duty of the Post-Master to send them out."

Mr. Justice YATES said—The *Bar* were not satisfied with that Determination.

Mr. Serjeant Davy urged, that if Post-Masters were obliged to send out Letters *within* Towns, it would follow "that They " would be likewise obliged to send them *out* of Towns."

Mr. Mansfield, in his Reply, denied this.

He also denied the Words "*Stage*" and "*Office*" to be synonymous: "*Stage*" comprehends the *whole* Town. The *Houses* are often changed: The *Stages* are not. It would be very hard, He said, if a Man's Letter, who lives, in a great Town, somewhat *beyond* the Post-House, a little further on from *London*, should be liable to be charged a Penny more; and yet that He should be obliged to *send* to the Post-House for it.

The

The Practice of the General Post-Office in *London* shews *their* *real* Sentiments about this Matter.

Lord MANSFIELD inquired if there was any Regulation made about this Matter, by the Post-Master General. 2dly. Whether this additional Money is accounted for to the public Revenue, or not. 3dly. Whether the Post-Master *Himself* can receive this additional Charge, as a *Rate*, (though his Servant might be permitted to receive it as a *Gratuity*,) even although the Person of whom He took it should consent to pay it: For, if He may, it impowers Him to raise whatever He pleases. This is a *new* Thing: How come They *now* to publish such an Advertisement?

N. B. Nothing is taken in *Bristol*, (as was attested by Mr. *Dunning*;) nor in *Lancaster* and *Liverpoole*, (as was declared by Mr. Justice *Yates*;) Yet in the Case of *Green* versus *Hopper*, some other Towns were mentioned, where it was practised.

Lord MANSFIELD—The whole Revenue ought to go to the *Crown*; none of it, to the Post-Master: And the Crown are to be at the whole Expence. This Practice would raise an immense Sum, in populous Towns.

ULTERIUS CONSILIUM.

Upon this Matter being now mentioned again—

LORD MANSFIELD took Notice, that the *principal* Question is put upon the *Charge*. Therefore, unless the Post-Master can support a Right to *impose such a Charge*, there is an End of the Action.

This Post-Master has published an Advertisement “that all
“ such Persons as chose to send to the Office, might have their
“ Letters, at the settled Rate, upon *sending* for them: But
“ such Persons as chose to have them delivered at their Places
“ of Habitation, MUST PAY a Half-penny for each Letter.”

HIS LORDSHIP declared He would not, upon the *present* Action and special Case, give a judicial Opinion upon the Question
“ Whether the Post-Master was or was not *obliged to deliver out*
“ the Letters to all Persons to whom they were addressed, in-
“ habiting *within* the City of *Bath*.”

The right Method of bringing *that* Question before the Court, is, for some Inhabitant of *Bath* to bring an Action against the Post-Master *for not sending* his Letters to his House.

Sir *Fletcher Norton*, for the Post-Master, said He would not pretend to argue it upon the Foot of the Post-Master's having a *Right to DEMAND a further Price* for the Letters, than the Acts of Parliament allow.

Whereupon,

THE COURT only declared as follows—

Upon *this* Case, as at present stated and left to Us, there must be a RULE

That the POSTEA be delivered to the PLAINTIFF.

N. B. The Point intended by both Parties to have been now settled, remained consequently undetermined: And the Counsel on both Sides agreed that They must think upon a Method of bringing it *properly* before the Court.

Afterwards, in *Easter* Term 11 G. 3. on 26th *April* 1771, it was determined by this Court, in a Case of *Stock, One &c.*, against *Harris, Deputy Post-Master of Gloucester*, “that the Post-Master was *obliged* to deliver the Letters “to the Inhabitants of that City, *at their Houses.*” But there, indeed, such a *Usage* had prevailed for a great Length of Time. And I am informed by a learned Serjeant, That in *Trin.* 13 G. 3. there was a Determination in *C. B.* between *Rowning* and *Goodchild*, which fully settles the Point. It was a Case reserved, upon an Action for Money had and received for the Plaintiff's Use. It was stated, that *before* the Year 1741, Letters by the *London* Post, directed to Persons living in *Ipswich*, were delivered *at their Houses*, on paying the legal Postage: But that One Penny was paid, over and above the legal Postage, for Letters by the Cross-Post; which were delivered at a different Time of the Day. That *in* the Year 1741, Notice was given by the Deputy Post-Master “that for the future, a Half-penny over and above the “legal Postage was to be paid for every Letter delivered “at any House in *Ipswich*.” And that a Half-penny for every Letter so delivered *has been since paid* to the Deliverer of the Letter, for his *own Use*. The Question submitted to the Opinion of the Court was “Whether “the Deputy Post-Master of *Ipswich* was bound to deliver

“ Letters *at the Houses* of Persons living in *Ipswich*, on “ paying the legal Postage *only*.” After two or three Arguments and taking Time to consider, it was unanimously holden “ that He *was*.” And Lord Chief Justice *De Grey* said, it had been the Practice for many Years, to deliver Letters *at the Houses* of Persons residing in *London, York, Bristol*, and divers other Towns, on paying the legal Postage *only*: And as there is the *same Reason* for doing it in *all other* Post-Towns, the *Law* ought to be the *same* in *All*.

Wednesday
27th January
1768.

This Morning, EDWARD WILLES Esq. his Majesty's Solicitor General, kissed Hands for the Succession to LORD LIFFORD, as *puisnè* Judge of this Court: And

JOHN DUNNING of the *Middle Temple* Esq. kissed Hands on being appointed *Solicitor General*, in the Room of Mr. WILLES.

Friday 29th
Jan. 1768.

Mr. WILLES went out Serjeant, *alone*. But He did not take his Seat upon the Bench, till *Monday* the first of *February*.

Clements, Esq. and Others, Executors of Dr. Baldwin, *versus* Waller, Esq.

THIS was upon a Writ of Error from *B. R.* in *Ireland*; where Judgment had been given for the Plaintiff *Waller*, Lessee of Dr. *Baldwin* late Provost of the College of *Dublin*, in an Action of Covenant brought there by Mr. *Waller*, against the Executors of Dr. *Baldwin*; and the Plaintiff had taken his Judgment against the Executors *de bonis propriis*.

The Short of the Fact was, That Dr. *Baldwin*, the late Provost had made a Lease to Mr. *Waller*, his Executors Administrators and Assigns; reserving the Rent to Dr. *Baldwin* and his Successors: And *Waller* had covenanted to pay the Rent to Dr. *Baldwin* and his Successors.

Dr. *Baldwin*, on the other Hand, had covenanted for Himself and his Successors, with *Waller*, his Executors Administrators and Assigns, to warrant and defend the Premises against Himself and his Successors. The Rent reserved was *less* than the Moiety of the *true yearly Value* of the Estate demised by the Lease.

Dr. *Baldwin* died. Dr. *Andrews* succeeded Him, as Provost; and brought his Ejectment against *Waller*, the Lessee; and evicted

evicted Him. Whereupon He brought this Action against the Executors of Dr. *Baldwin*, upon Dr. *Baldwin's* Covenant. They craved *Oyer* of the Lease, and pleaded the Act of the *Irish* Parliament of 10 & 11 C. 1. c. 3. § 2. which gives Power to Governors of Colleges &c, to demise for 21 Years, reserving
 “ so much yearly Rent or Profits, or more, *at the Peril of the*
 “ LESSEES *who shall take the same*, as the Moiety of the true
 “ Value of the said Lands &c, (*communibus Annis*,) at or immediately before the Time of the making of such Lease shall
 “ amount unto.” To this Plea, the Plaintiff *Waller* demurred: And the Court of King's Bench in *Ireland* gave Judgment for him. Upon which, the Executors of Dr. *Baldwin* brought the present Writ of Error.

The QUESTION now litigated was, “ Whether the Action
 “ could be maintained against the *Executors* of the late Provost,
 “ upon his Covenant for Himself and his *Successors*, to warrant
 “ and defend &c; in which Covenant his *Executors* were not
 “ named.”

Mr. *Wallace*, for the Plaintiffs in Error, argued in the Negative. The *Executors* of Dr. *Baldwin* are *not bound*, he said, by this Covenant. His Interest was only a *Life-Estate*, as Head of the College: And He only binds his *Successors*, not his Executors or Administrators. He could not *mean* to bind them: For, the Rent is reserved to Himself and his *Successors*; not to his Executors. They had no Concern in the Matter: His Interest ended with his Life. Besides, The Invalidity of this Lease was the Fault of the *Lessee himself*. The Words used in this *Irish* Act are not to be found in any of the *English* Acts. It directs the Reservation to be of not less than a Moiety, “ at the *Peril of the*
 “ LESSEE.” Therefore it was incumbent upon the *Lessee* to see that a Moiety was reserved: And He has no Right to come upon the Executors of Dr. *Baldwin*, when the Fault was his own.

But supposing that the Plaintiff *Waller* had a Right to sue Dr. *Baldwin's* Executors, yet this Judgment in *Ireland* is erroneous; being *de bonis propriis*. It ought to have been—*de bonis Testatoris*. A Judgment in Covenant against an Executor ought to bind the Effects of the Testator *only*; even for a Breach of Covenant in the *Time of the Executors*: As is fully settled in *Hob. 188. Collins versus Thoroughgood*; and *Cro. Jac. 671. Bridgman versus Lightfoot*.

Mr. *Ashurst*, *contra*, (for the Defendant in Error) acknowledged several Inaccuracies: But the single Question in *Ireland* was—“ Whether the *Executors* of the late Provost are liable to
 “ the

“ the Action; the Premises having been recovered by the present Provost, against the Lessee, the Plaintiff there, for Want of the Reservation of the proper Rent.”

This Covenant of Dr. Baldwin's is *not* binding upon his Successors: Therefore the *Intention* of the Covenant must have been “ that the Doctor should take the Peril upon Himself and his Executors, of the Lands being evicted from the Tenant for Want of a full Moiety being reserved:” And the Covenant shall be taken most strongly *against* the Covenantor. Consequently, the Executors *are* bound by this Covenant. The *Successor* is the very Person *against* whose Claim the Covenant is intended to secure the Lessee. Executors shall be bound by a Covenant, *though not named*: Especially, in an express Covenant of Warranty; where the Thing *continues* after the Death of the Covenantor.

As to this Judgment being against the Executors *de bonis propriis*—He admitted that it ought to have been *de bonis Testatoris*.

However, this may be set right here, under the Statutes of *Jeofails*. For which, He cited 2 *Lev.* 22. *Chapman versus Gale*. And that Case was only after Verdict and Judgment: This is after Demurrer, only. And *Poole versus Longuevill et al.* in 2 *Saunders* 289. is a strong Case of an Amendment after a Writ of Error.

Mr. Wallace—All the Judgment that this Court can, in the *present* Case, give, is “ to *reverse* the Judgment;” because this Writ of Error is brought by the *Defendants*. The Distinction is laid down, in the Case of *Parker versus Harris*, 1 *Salk.* 262. That where the *Plaintiff* brings Error, the Court shall give such Judgment as the Court below should have given: But where the Writ of Error is brought by the *Defendant*, there shall only be Judgment to *reverse* the former Judgment; because the Suit is only to be *eased* and *discharged* of that Judgment.

In Reply to Mr. *Asburll*, He admitted the Intent of the Act of Parliament to have been to prevent the Covenantor from binding his Successor, unless a Moiety of the true yearly Value was reserved. But this is the real Fault of the *Lessee*: He must have known the true yearly Value; because this Lease was made upon his surrendering an old One.

And as to setting the Judgment right by an Amendment—The Answer is, that a Judgment in *Ireland* cannot be amended *here*.

THE COURT *denied* this; and cited the Case of *Berne* *versus Berne* *, as an Instance of its being done.

* It was in M.
1734, 8 G. 2.
B. R. in Error

from Ireland, on a Judgment in an Action of Dower. It was amended *instante*, according to my Note; and Judgment affirmed. And the like Amendment was afterwards made, on Mr. Denison's Motion, and after very solemn Deliberation, in Easter Term 1741, 14 G. 2. in a Case of *Thompson v. Slicer*, on a Writ of Error from Ireland, in an Action upon a Promissory Note.

LORD MANSFIELD—This Case will not turn upon the *Form*: For, it is clear upon the *Merits*. The Words of the Act of Parliament are, “that it shall be at the *Peril of the Lessee*.” The Lessee *knew* the Value; because, to obtain *this* Lease, He surrendered an *old* One. The Lessor might not know the Value. The Act imposes the Risk upon the Lessee; and says, his Lease shall be void, unless made pursuant to that Act, which requires a Moiety of the true yearly Value to be reserved, and which was *not* here reserved.

Mr. Justice YATES—The Lease is void. It is in the Teeth of the Act of Parliament: And the Act is express, “that the Reservation shall be at the *Peril of the Lessee*.” Besides, this Judgment is erroneous, as being against the Executors *de bonis propriis*.

Mr. Justice ASTON agreed, that it was clearly contrary to the Act of Parliament. The Act meant to prevent the Tenants from concealing the true Value of the Lands: And it is express “that it shall be at the *Peril of the Lessee*.”

Per CUR’. unanimously—

JUDGMENT reversed.

Harris *versus* Barnes et Al’.

Wednesday
3d Feb. 1768.

THIS was a Case out of Chancery, upon the Will of *George Coningesby* D. D. who, being seised in Fee of the Manor of *Grendon Warren &c* in the County of *Hereford*, on 15th Feb. 1766, made his Will; in which (*inter alia*) are these Words—“I give and devise my Manor of *Grendon Warren* in the County of *Hereford*, and my Farm Lands and Premises called *Grendon Warren* in the Occupation of the said *James Stone*, and all my Estate called *Little Hegdon* alias *Hegthorn* lying within or near to *Grendon Warren* aforesaid, also All other my Freehold Estates Lands and Premises lying and being at *Grendon Warren* aforesaid or in any other Parish or Place

PART IV. VOL. IV.

O o o

“ within

“ within the said County of *Hereford*, unto my Kinsman Co-
 “ ningesby *Harris*, of the Parish of *Claines* in the County of
 “ *Worcester* Gentleman, for the Term of 90 Years from my De-
 “ cease, if the said *Coningesby Harris* shall so long live: And
 “ after the Determination of that Term, I give and devise all the
 “ said Premises in the County of *Hereford* unto the Heirs of the
 “ Body of the said *Coningesby Harris*. And in Default of such
 “ Heirs, I give and devise All my said Estates and Premises in
 “ the County of *Hereford* unto my Cousin Mrs. *Susan Elletson*,
 “ for the Term of 90 Years if the said *Susan Elletson* so long
 “ lives, and to commence from the Decease of the said *Coningesby*
 “ *Harris*, He dying without Issue: And subject to the Estates
 “ and Contingencies before mentioned, I give and devise All
 “ my said Estates in the County of *Hereford* unto *Roger Elletson*
 “ Esq. Son of my said Cousin *Susan Elletson*, for and during the
 “ Term of his Life; and from and after his Decease (subject to
 “ the Devises aforesaid) I give all my said Estates and Premises
 “ in the County of *Hereford* unto the first and every other Son
 “ and Sons of the Body of the said *Roger Elletson*, and to the
 “ Heirs Male of the Body and Bodies of every such Son lawfully
 “ issuing;” with several Remainders over. And after directing
 all his Legacies Debts Funeral Expences &c, to be paid out of
 his personal Estate, He goes on—“ And after such Payments,
 “ that my said Trustees apply the Residue and Remainder of my
 “ said personal Estate, in purchasing Lands Tenements and
 “ Premises in Fee-Simple lying in the County of *Hereford*; such
 “ Lands Tenements and Premises to be conveyed to and vested
 “ in the Trustees named in his Will their Heirs and Assigns,
 “ IN TRUST to and for and upon the same Uses Limitations
 “ Persons and Purposes that my said Estates in *Herefordshire* are
 “ by me before given or devised or stand limited by this my
 “ Will, and consistent with the Contingencies happening in the
 “ mean Time: And for the Trusts and Purposes before men-
 “ tioned relating to my personal Estate, I give and devise unto
 “ the said Trustees (naming them) their Heirs and Assigns all
 “ my Freehold Estate and Title I have in any Mortgage or
 “ Mortgages in Fee, and the Fee and Freehold and all my Right
 “ of and in all such mortgaged Estates and Premises.”

The said Testator Dr. *Coningesby* died on or about the 15th
 Day of *March* 1766, without altering or revoking his said Will,
 (except that by a Codicil, dated the 20th of *February* 1766, He
 gave 80*l.* to his Servant *John Winkbridge*.) without issue; leav-
 ing the Defendant *Elizabeth Barnes* his only Sister and Heir at
 Law.

The Executors duly proved the Will, and took upon themselves the Burthen of the Execution thereof.

The Plaintiff *Coningsby Harris*, the first Devisee in the said Will named, of the *Herefordshire* Estates, soon after the Death of the said Testator, entered and took Possession thereof; but hath no Issue of his Body.

Mrs. *Susan Elletson*, the next Devisee of the said *Herefordshire* Estates, survived the said Testator, and is lately dead, leaving *Roger Elletson* her only Son and Heir at Law.

The said *Roger Elletson*, the next Devisee of the said *Herefordshire* Estates, is now living; but hath not any Child.

The Monies and Securities for Money, Arrears of Rent, and other personal Estate directed by the said Will to be laid out in the Purchase of Lands, and settled to the same Uses with the *Herefordshire* Estate, is of a considerable Amount, and is as yet unliquidated: But the same hath not as yet been laid out in a Purchase, pursuant to the said Will.

The QUESTION therefore referred for the Opinion of this Court upon the above Case and Facts, is "Whether the Heirs of "*the Body of the Plaintiff Coningsby Harris* take any and what Estate under the said Testator's Will."

On Friday last, the 29th of January, Mr. Jones, on behalf of the Plaintiff *Coningsby Harris*, argued that this was a good Executory Devise, within the Compass of Time allowed by Law.

The Time allowed by Law is a Life or Lives in being, or 21 Years after.

If the Testator meant it as an *immediate* Devise, and no Person was in being to take, it would go over to the Remainder-Man.

But from the Nature of this Devise, the Testator meant a future executory Devise. It is a Devise to *Coningsby Harris* "for 99 Years, if He shall so long live; and after his Death, "to the Heirs of the Body of *Coningsby Harris*."

Therefore a future Executory Devise passed by these Words; and no Estate immediately.

He

He disputed the general Distinction between Words *de præsenti*, * and Words *de futuro*. And He argued that it cannot take Effect as a *Contingent Remainder*; even though the Testator meant it so. But He did *not* mean it so. He meant it to be an Executory Devise; and the Law will give Effect to the Testator's legal Intention: The Manner *how*, is immaterial.

* See Abridgment of Cases in Equity, p. 189. pl. 14 & 15. and 1 Salk. 226 & 229, 230. also 12 Mod. 52.

The Freehold descended to the Heir at Law; and shall be fetched back when the Contingency happens. 1 *Peere Wms.* 505. *Carter versus Barnadiston.* 1 *Levinz* 11. *Plunket versus Holmes.*

To shew that this was an *Executory Devise*, and not a *Contingent Remainder*, He cited *Gore versus Gore*, 2 *Peere Wms.* 28. and 65. and *Doe, on the Demise of Salter, versus Carlton*, in Ejectment in B. R. 28th June 1745—Devise to his Son *Henry Lee* for 99 Years; afterwards, to such Person as should be *Henry's* Wife at the Time of his Death, for 99 Years, if She should so long live; and after her Death, to the Heirs of the Body of his said Son *Henry* lawfully issuing, and the Heirs of their several Bodies. The Court held clearly “that this Limitation to the Heirs of the Body of his Son *Henry*” “was good as an Executory Devise.”

† See 1 Salk. 226. 12 Mod. 52. and Skinner 408. S. C.

As to the Cases of *Goodright versus Cornish* †, and *Scatterwood versus Edge* ‡, they are too badly reported to be cited.

‡ 1 Salk. 229. and 12 Mod. 278; but there called *Scattergood v. Edges*. See them Both abridged, in the Abridgment of Equity Cases, p. 189. pl. 14, 15.

Here, the Heirs of the Body must take *by Purchase*, if it be a good Executory Devise.

Mr. *Blackstone*, *contra*, for *Roger Elletson*, (premising that this is an incorrect Question; for that *Coningesby Harris*, being *now living*, can have no Heirs of his Body;) endeavoured to distinguish this Case from that of *Gore versus Gore*; and likewise from the Case of *Doe, ex dim'. Salter, versus Carlton*: Though He admitted the Principles of both these Cases. He agreed that the *Intention* of the Testator was “that the Heirs of the Body of *Coningesby Harris* should take;” but denied that this Intention *could take Effect by Law*.

This Devise is—“To *Coningesby Harris* and the Heirs of his “Body,” *generally*; not to his “first and every other Son,” as was the Case in *Gore versus Gore*. That Term was 500 Years: This is only 90. *Coningesby Harris* might, by Possibility, have outlived

outlived this Term. Here are Three Contingencies: In *Gore* versus *Gore*, there were *only Two*. The first Contingency in the present Case is *Coningsby Harris* having Issue; 2d, His dying during the Term; 3d, His Issue surviving Him.

Here, *no Estate descended to the Heir at Law*, in the mean Time, to support the Executory Devise: Which is necessary, to prevent the Freehold from being in Abeyance. This is the Foundation of Executory Devises: And One of the principal Questions in the Case of *Gore* versus *Gore* was *, “*In whom the*” * V. 1 Peere Williams 29.
“Freehold vested at the Death of the Testator.”

Here is an *absolute immediate Devise of the Freehold* to *Roger Elletson*. It can not go back to the Heirs of the Devisor: For, it is a *complete Devise of All the Freehold* to *Roger Elletson*. It is not like the Devises of the Freehold in the Cases of *Gore* versus *Gore*, or *Doe, on the Demise of Salter*, versus *Carlton*.

There was no such express immediate Devise of the Freehold. But in the present Case, the Freehold immediately vested in *Roger Elletson* and the other Devisees.

The Distinction between divesting Estates, or not, depends upon the Estate's coming by *Purchase*, or by *Descent*. *Lincoln College Case*, 3 Rep. 61. b. 1 Co. 95. *Shelley's Case*. And here, it being vested in *Roger Elletson* by *Purchase*, it can not go back.

Therefore this Case varies materially from the two Cases cited, and also from the Case of *Carter* versus *Barnadiston*, For, this is an *immediate Devise*, though subject to Charges.

Mr. *Jones*, in Reply, insisted, that this is an Executory Devise; (being within the allowed Compass of Time;) and that the Freehold vested in the Heir at Law of the Testator, in the mean Time, notwithstanding the Devise to *Roger Elletson*: For that the Devise to *Roger Elletson* was not meant to take Effect, till after the Failure of the Contingencies. After that Event, indeed, and subject to the Estates and Contingencies before-mentioned, the Testator gives Him the Remainder: But He meant Nothing at all for him, till after the former Estate given to the Heirs of the Body of *Coningsby Harris*.

LORD MANSFIELD—We'll think of it, and give our Certificate. We shall consider what the Testator meant, and the necessary Construction of his Words.

And now,

HIS LORDSHIP communicated to Mr. *Blackstone* (publicly) the Certificate which They had settled; *viz.*

Having heard Counsel on both Sides, and considered this Case, We are of Opinion that the clear manifest *Intent* of the Testator was to give an Estate Tail to such Person as should be Heir of the Body of *Coningsby Harris at the Death of the said Coningsby*, (the only Determination of the 90 Years Term in the Testator's View,) "*to Him and the Heirs of the Body of the said Coningsby*;" with Remainders over, as in the Will: Which Intent of the Testator may, by Law, take Effect as an *Executory Devise*; for, the Contingency must happen within the Compass of a Life in Being; And the Freehold, in the mean Time, (being undisposed of,) descends to the Testator's Heir at Law.

And this, his Lordship said, would effectuate the whole Intention of the Testator.

See the Case of *Roberge de Mandevile*, Co. Litt. 26. b. and *ante*, Vol. 1. p. 50, 51. the Case of *Lancelot Hicks*, Devisee of *George Robinson*.

Thursday 4th
Feb. 1768.

Rex *versus* Inhabitants of Wooton St. Lawrence.

See this Case *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 187. Page 581.

Carter and Another, *versus* Murcot and Another.

THIS was an Action of Trespass for breaking and entering the Plaintiff's Close called *The River*, or *The River Severn*. The Defendant pleaded that it is a *navigable River*; and also, that it is an *Arm of the Sea*, wherein every Subject has a *Right to fish*. The Plaintiff (without traversing these Allegations) replied, that this was *Part of the Manor of Arlingham*; that Mrs. *Yates* was seised of that Manor: And prescribes for a *several* Fishery

Fishery there. Issue being joined thereon; a Verdict was found for the Plaintiff.

On Monday 9th November last, Mr. *Asburst*, on behalf of the Defendant, moved in Arrest of Judgment, and had a Rule to shew Cause.

He objected that though the *Fact* was so found, yet the *Law* is otherwise; viz. that every One has a *Right* to fish in a navigable River, or in an Arm of the Sea. He cited 1 *Mod.* 105. Anonymous. 6 *Mod.* 73. *Warren versus Matthews.* 1 *Salk.* 357. S. C. and *Ward versus Creswell*, C. B. 14 & 15 G. 2, which recognizes 1 *Mod.* 105.

Mr. Serjeant *Nares*, for the Plaintiff, now shewed Cause.

It is *not* an Arm of the Sea where the Sea flows and reflows; but a *Part of a Manor*.

It is found to be IN *the Manor* of *Arlingham*, in the County of *Gloucester*. And a Place may be Parcel of a Manor, if between the High and Low Water Marks; though the Sea flows and reflows upon it. So is *Sir Henry Constable's Case*, 5 *Co.* 107. *a.* *Eraclon*, lib. 2. c. 12.

Mr. *Asburst*, *contra*, for the Rule.

An exclusive Right cannot be maintained by the Subject, in a River that is an Arm of the Sea: The *general* Right of Fishing in an Arm of the Sea is common to all.

The Replication ought to have shewn that this was a separate Pool: But the Plaintiff can not maintain a *general* Right in the River, in Exclusion of all other the King's Subjects.

In *Sir Henry Constable's Case*—The Admiral had Jurisdiction between the High and the Low Water Mark. When the Tide is in, the Water can not belong to a Manor: And a Fishing can only be exercised when the Tide is in—when there is Water.

In *Sir John Davys's Reports*, p. 55.—the Case of the Fishery in the River *Banne* in *Ireland*—it is said that the King has a Right as high as the Sea flows and reflows. And an Arm of the Sea, where the Tide flows and reflows, is the same as the Sea itself. *Justinian Inst.* lib. 1. c. 1. tit. 1.

6 *Mod.*

6 Mod. 73. *Warren versus Matthews*—Every Subject, of common Right, may fish with lawful Nets &c, in a navigable River, as well as in the Sea; and the King's Grant can not bar them thereof. 1 Salk. 357. S. C. Per Holt Chief Justice—"The Subject has a Right to fish in all navigable Rivers, as He has to fish in the Sea."

1 Mod. 105. *Anon.* In Case of a River that flows and reflows, and is an Arm of the Sea; Hale says, "The Right of Fishing, is *primâ facie* common to All."

Lord MANSFIELD—The Rule of Law is uniform.

In Rivers *not* navigable, the *Proprietors of the Land* have the Right of Fishery on their respective Sides: And it generally extends *ad Filum medium Aquæ*.

But in *navigable* Rivers, the *Proprietors of the Land* on each Side have it *not*; the *Fishery is common*: It is, *primâ facie*, in the King, and is *public*.

If any One claims it *exclusively*, He must *shew a Right*. If He can shew a Right by *Prescription*, He may then exercise an exclusive Right: though the *Presumption is against Him*, unless He can *prove* such a prescriptive Right.

Here, it is claimed, *and found*. It is therefore consistent with all the Cases, "that He *may* have an exclusive Privilege of fishing, although it be an Arm of the Sea." Such a Right shall not be *presumed*; but the Contrary, *primâ facie*: But it is *capable of being proved*; and must have been so in the present Case.

Mr. Justice YATES—I was concerned in a Case of this Kind. Such a Claim was made: But the Claim failed, because it there happened that such a Right could *not* be proved: Therefore it was in *that* Case determined that the Right of Fishing was *common*. But such a Right *may* be proved. By the Law of *England*, what is otherwise common *may*, by Prescription, be appropriated. GROTIUS owns, that navigable Rivers *may* be appropriated.

The cited Cases prove only this Distinction, "That navigable Rivers or Arms of the Sea *belong to the Crown*; and not (like private Rivers) to the Land-Owners on each Side:" And therefore the *Presumption* lies the *contrary* Way in the One Case, from what it does in the Other. Here, indeed, it lies, *primâ facie* on the Side of the King and the Public: But it *may* nevertheless be appropriated by Prescription.

The Case of the Royal Salmon-Fishery in the River *Banne*, in Sir *John Davys's* Reports, is agreeable to this: And 'tis a very good Case. It appears by it, that the Crown may grant a several Fishery in a navigable River, where the Sea flows and reflows, or in an Arm of the Sea: And in the Case of *Abbotsbury* there mentioned*—the Court said, "it must be intended that" * P. 57. a. "the Abby had originally had a grant from the Crown." And in the Case in 1 *Mod.* 105. *Hale* says truly—"If any One will appropriate a Privilege to Himself, the Proof lieth on his Side." Now if it may be granted, it may be prescribed for: A Prescription implies a Grant. But it can't be presumed: It must be proved.

Why then may not this Plaintiff *prescribe* for an exclusive Right of fishing in an Arm of the Sea, and PROVE this Appropriation, though the *primâ facie* Presumption is contrary?

Mr. Justice ASTON concurred. This is the true Distinction: And 1 *Mod.* 105. is in Point.

Per CUR'†.

† Mr. J. Willes
was gone out
of Court.

RULE DISCHARGED.

Wellington *versus* Wellington.

Friday 5th
Feb. 1768.

THIS was a Case out of Chancery, upon the Will of *Richard Cary* late of *Walcott* in the County of *Oxford* Esq. wherein, after directing the Payment of his Debts and Funeral Expences, he proceeds thus.—"Item, in DEFAULT of Issue of my own Body, I give devise and bequeath &c;" and so gives All his Estates in the several Counties of *Oxford*, *Southampton*, *Middlesex*, *Surry*, *Hereford*, and in the City of *London*, unto *John Arrow-smith* of *Chalbery* in the County of *Oxford* Clerk, and to *James Simmons* One of the Aldermen of *New Woodstock* in the County of *Oxford*, and their Heirs, IN TRUST to pay, out of the Rents Issues and Profits, unto his Sister *Elizabeth Wellington* an Annuity of 100*l.* per Annum, during such Time and until All his just Debts Funeral Expences and Legacies (other than Annuities) should be fully paid and satisfied; and also an Annuity of 40*l.* per Annum to a Servant, *Sarah Vollier*. Then He gives another Annuity, and several Legacies. Then He wills that immediately from and after such Time as All his just Debts Funeral Expences and the Legacies given by his Will (other than Annuities) shall be fully paid and satisfied by the said Trustees, from and out of the

Rents and Profits of his said Estates, and subject to the two Annuities before given to the said *Sarah Vollier* and *Jane Wellington*, He gives and Devises All his Estates to his Sister *Elizabeth Wellington*, for Life; Afterwards, to the said Trustees, to preserve Contingent Remainders; and after her Decease, to the Use of *James Wellington*, the second Son of his said Sister *Elizabeth*, for Life; then to the Use of the Trustees during his Life; and after his Death, to the Use of his first and other Sons in strict Settlement, in Tail-Male; and for Default of such Issue, then in like Manner, to the Use of *Richard Cary Wellington*, the Eldest Son of his said Sister *Elizabeth*; and in Default of such Issue, then, to All and Every other Son and Sons of his said Sister *Elizabeth*, in Tail-Male; and for Default of such Issue, then, and in like Manner, to the Use of *Jane Wellington* the Daughter of his said Sister *Elizabeth*, in Tail-Male; And for Default of such Issue, then, to the Use of the first and every other Son of his Sister *Jane* late the Widow of *Richard Wooley* and then the Wife of *Thomas Collins*, in Tail-Male. And lastly, He gives all his Estates to such Person as may be his Heir at Law; EXCEPT any Person or Persons as shall or may claim so to be, as being descended from his late Uncle *Francis Henry Cary*, Clerk. To these Bequests He annexes several Provisoes, Conditions, and Directions. And as to all the Rest and Residue of his Estate, He gives the same to his said Trustees *John Arrowsmith* and *James Simmons*, their Heirs Executors and Administrators, and likewise All his Copyhold Estates, to the same Uses; and appointed his said Sister *Elizabeth Wellington* Executrix.

The Testator, at the Time of making his said Will, and at the Time of his Death, was seised in Fee of the Premises devised by Him to the said *John Arrowsmith* and *James Simmons*, in Default of Issue of his own Body; and died a Batchelor, leaving the said *Elizabeth Wellington* and *Jane Collins* Wife of *Thomas Collins* his Sisters and Coheirs. His said Trustees accepted the Trusts.

Upon these Facts, it was ordered by a Decree in Chancery, dated 9th Nov. 1767, in a Cause between the said *Richard Cary Wellington et al.* Plaintiffs and *Thomas Collins* and the said *Elizabeth Wellington et al.* Defendants, that the following Question be put for the Opinion of this Court of King's Bench—viz.

“ Whether the said *John Arrowsmith* and *James Simmons*,
 “ the Trustees in the said Will, took any; and what Estate
 “ under the said Will.”

Mr.

Mr. *Blackstone*, on behalf of the Plaintiff, argued that They took a *base* Fee, determinable upon the Payment of the Debts Legacies and Annuities.

The Objection was, that this Devise to them is an *executory Devise*, and *too remote* to take Effect by Law: It is not to take Place till after a *general* Failure of Issue.

Answer—The Default of Issue of his Body is only a *Condition precedent*. The Testator was a Batchelor: His Will was to take no Effect if He married, and had Children. The Words of it are—"In *Default* of Issue of my own Body," I give devise and bequeath &c.

If He had married and had Children, *That* would have amounted to a Revocation of this Will. To prove which, He cited 1 *Ld. Raym.* 441. *Lugg* versus *Lugg*, and 2 *Salk.* 592. S. C. One being single, made his Will, and devised All his personal Estate to *J. S.*: Afterwards He married and had several Children, and died without other Will or Disposition: And before the Delegates, (of whom Lord Chief Justice *Treby* was One,) it was decreed, "that there being such an Alteration in his "Estate; and Circumstances being so different at the Time of "his Death, from what they were when He made the Will; "there was Room and presumptive Evidence to believe a "Revocation, and that the Testator continued *not* of the same "Mind."

So, in 2 *Shower* 242. *Overbury* versus *Overbury*, it was adjudged, upon an Appeal to the Delegates, that if a Man makes his Will, and disposes of his personal Estate amongst his Relations; "and afterwards hath Children, and dies; this is a *Revocation* of his Will, according to the Notion of the Civilians; "this being an *inofficiosum testamentum*."

In 1 *Peere Wms.* 304. *Cook* versus *Oakley et al.* a Case of *Eyre* versus *Eyre* is cited; wherein it was holden "that the total Alteration of the Testator's Circumstances by marrying and having Children, was an implied Revocation of his Will."

And in the Note at the Bottom of that Page, a Case of *Brown* against *Thompson* is mentioned, wherein Sir *John Trevor* held "that a subsequent Marriage, and having Children, was a *Revocation* of a Will of *Land*." And it appears in 1 *Eq. Cases Abr.* 413. that the Lord Keeper [*Wright*] was clear of Opinion "that Alteration of Circumstances *might be* a Revocation of a "Will of *Lands*, as well as of a *personal Estate*;" and allowed that

- that the Statute of Frauds and Perjuries does not extend to an *implied Revocation*.

So far the Courts have gone in *implied Revocations*.

But here the Issue never existed. The Contingency never happened. The Issue which never existed could not be said to fail. He mentioned a Case of *Parsons versus Lane*, H. 7 G. 2. where the Words were, "in Case of his not returning from *Ireland*"—And Lord *Hardwicke* held it Conditional and Contingent.

This Devise being *Conditional*, the Court will support the Intention of the Testator.

This Expression, "in *Default* of Issue of my own Body," differs from saying "on *Failure* of Issue of my own Body." The latter Expression supposes that Issue will exist: The former does not. It is consistent with the Event of their never existing, as well as of their dying in his life-time.

This is *not* too remote for an Executory Devise: It was to take no Effect, if the Testator should have Children at his Death. He has only expressed what the Law would have implied.

2dly. But if it be not a *Conditional Devise*, yet it is *not an Executory Devise*; but an *immediate Devise*, to vest, (if it shall vest at all,) upon the *Death* of the Testator. In the Abridgment of Cases in Equity, p. 186. an Executory Devise is defined to be "a *future Interest*, which *can not vest at the Death* of the Testator; but depends upon some Contingency, which must "happen before it can vest." Whereas this is a present Interest which *must* vest at the *Death* of the Testator, if at all.

The Case of *Walter versus Drew et al.* in C. B. Comyns 372. shews that the Estate to the Issue of the Testator must be an Estate Tail. That was a Devise that if *William*, the eldest Son of the Testator should happen to die without Issue, then and not otherwise, after *William's* Death, he devised over to his Son *Richard* and his Heirs: It was holden "that *William* took an Estate Tail, by Implication." Therefore it can only give an Estate Tail to such Issue as might happen to be born between the Time of the Testator's making his Will, and his Death.

This Remainder to the Trustees is a *base Fee*, till Issue of the Testator's Body shall fail: And it would come into Possession on the
the

the Testator's Death. 1 *Peere Wms.* 397. *Goodright* versus *Wright*.

3dly. If it should be considered as an *Executory Devise*—Still it must mean “*such Issue as should be living at the Decease of the Testator:*” Therefore it would *not* be too remote, even upon the Foot of its being an *Executory Devise*.

The Testator certainly *meant* an *immediate Estate* to the Trustees; because He has directed them to pay Debts Legacies and Annuities. And their Estate took Effect immediately, by *Lapse*. *Vaughan* 270. *Gardner* versus *Sheldon*.

The Trustees, therefore, took *some Estate* by the Will:

The only Question is, “*What Estate they took.*”

It is given to them *and their Heirs*; and is to subsist, till the Debts Legacies and Annuities be paid.

Mr. *Dunning*, Solicitor General, *contra*, for the Defendants.

The Question turns upon the Construction of the Words “*In Default of Issue of my own Body.*”

They mean an *indefinite*, a *general Failure of Issue*: Therefore the *Executory Devise* is *too remote* to take Place, in Point of Law.

In *Warburton's Case* in 1764, before Lord *Northington*—He was of Opinion “that the Devise to the Plaintiff being after a “general Failure of Issue Male, was too remote, and void.” And that was (as this is) after Failure of the Testator's *own Issue*; and to those who were his Heirs at Law.

Though the present Testator was a Bachelor, and might think it probable that He should remain so; and therefore, in *that* Event, might mean his Sisters to take; yet the same Intention, for them to take, was as probable, in Case a different Event should happen; namely, that of his marrying and having Issue, and that Issue afterwards failing. Both Dispositions are equally reasonable and proper, and might (for aught that *He* knew to the Contrary) be equally legal.

The Testator might easily have expressed that limited Sense, if He had meant it: He might have added the Words “*Living at the Time of his Death.*” But He meant that All the Contingencies should take Place, according as the Events should

happen; and had no Intention of confining the general Failure of Issue of his Body, to the particular Time of his own Death.

These can not be considered as *Remainders*: It is an Executory Devise, intended to take Place *in futuro*.

The Notion is quite new, "that an Estate Tail by Implication can arise in the Testator's Issue:" The Words can not support *such* an Idea of the Testator's Meaning.

Nor did the Testator mean to give his Trustees a *base Fee*. He only meant to give them an Estate *on FAILURE of his own Issue*, whenever they should become extinct: Then, and *not till* then, his Sisters were to take. But that is a Period too remote for supporting it as an *Executory Devise*. It can not take Place as a *contingent Remainder* upon the Testator's Children taking an Estate Tail by Implication: For there is no Estate to *support* such a contingent Remainder.

There is no Reason to suppose that the Testator meant these Words in a more restrained Sense than their Ordinary usual Sense. There is no Foundation to support this Devise as an *immediate Devise*; and much less, as a *contingent Remainder*.

"IN DEFAULT of my *own Issue*" means, that whether his Issue should fail by his never having had any, or by their becoming extinct, it should in either Case go to his Sisters.

Lord MANSFIELD observed, that this is only a *double Contingency*: Of which, One Part is *good*, by Law; the Other, bad.

Mr. *Blackstone*, in Reply—The Testator's provisional Disposition is an *abundans Cautela*.

This Case is singular, as being in Default of Issue of the Testator's own Body.

Warburton's Case was not a Determination on Contest and Argument. It was a Bill to prove the Will *per Testes*: And the Devisee was Heir at Law of the Testator.

The Court will go as far as They can, to support the Intention of the Testator.

I did not mean that the Testator meant an Estate Tail to *Himself*: I meant that if He should happen to have Issue *born after making the Will*, it might be an Estate Tail in *them*.

I principally rely on it's being only a *Conditional Devise*.

LORD MANSFIELD—When a Devise must take Effect at the Death of the Testator, it is not properly an *Executory Devise*. Such a Devise is a Devise upon a Contingent Event which must happen at or before the Death of the Testator. An *Executory Devise* is a Devise that is to take Place *in future*.

As to an *implied* Revocation, from Alteration of Circumstances; it is now settled—"that as to *personal* Estates, Marriage and "having a Child is a Revocation:" But no Case has yet holden Marriage *alone* to be a Revocation.

I see no Ground of Argument why the Law should not be the same, as to Devises of *Land*: The Reason is the same. In *Meggot* versus *Meggot*, Lord *Hardwicke* directed an Issue, merely to try this Question: But the Cause was made up by the Family, and never tried *.

* Note—It has since been adjudged in

the Court of Exchequer, by the Opinions of Sir Thomas Parker (then Lord Chief Baron,) Mr. Baron Smythe, and Mr. Baron Adams, against Mr. Baron Perrott; and also at the Cockpit, Sir Eardley Wilmot and Lord Chief Justice De Grey concurring, "that Marriage and a Child was a Revocation of a Devise of *Land*."

WE will think upon it; and give our Certificate.

The CERTIFICATE was as follows—"Having heard Counsel "on Both Sides, and considered this Case, WE are of Opinion "That *John Arrowsmith* and *James Simmons* took a FEE, determinable when the Purpose of paying the Testator's Debts "Legacies and Funeral Expences, out of the Rents Issues and "Profits of the devised Premises, in Aid of the personal Estate, "shall be performed."

It was dated 11th February 1768.

Rex versus Lambe, Esq.

ON Tuesday 10th November, in Michaelmas Term last, a Motion was made for a New Trial; and a Rule granted to shew Cause why the Verdict should not be set aside, and a New Trial had.

The Cause was tried in the County Palatine of *Durham*; and related to the Rights of a Corporator of *Durham*. On the last Day of that Term, Mr. Justice ASTON reported the Evidence, from

from Mr. Baron *Perrott* who tried the Cause. But it is not necessary to meddle with that, at present: For, though some Objections were then made to the Proof of Facts, and that the Evidence was not sufficient to support the Verdict, yet the *principal* Objection taken on behalf of the Defendant, was, “that “the *Warrant for a Tales de Circumstantibus*,” (for there were not enough of the *Special Jury*,) “ought to have been a Warrant “from the Attorney General of the *County Palatine*:” Whereas the Prosecutors had only procured a Warrant from His Majesty’s *Attorney General*.

It was now argued by Mr. *Wallace* and Mr. *Wingfield*, for the Prosecutors; and Sir *Fletcher Norton*, Mr. *Wedderburne* and Mr. *Davenport* for the Defendant.

As to the Trial by a *Tales*, without any Warrant from the Attorney General of the *County Palatine*—The Answer was, that it fell within the *Equity* of the *Stat. of 5 Eliz. c. 25. § 2.* which enacts “that in *Wales* and in the Counties Palatine of *Chester* “*Durham* and *Lancaster*, where a full Jury shall not appear, “the Justices may, upon Request by the Plaintiff or Demandant, command the Sheriff to name so many other Persons “present, as shall make up a full Jury: which shall be added to “the former Pannel.”

The *substantial* Intention of the Act was, that in *all* Causes where Issue is joined in the Courts in *Westminster-Hall*, the Judge who tried the Cause should grant a *Tales*: And there is no Exception of the Counties Palatine.

But it is objected, “That the Request was not made by any “Person authorized to make it on the Part of the Crown: For, “that it was made by the Attorney General of the King, and “not by the *Bishop’s Attorney General*.”

Mr. *Wallace* said He remembered an Objection directly the *Reverse* of this: And the Judge refused to try the Cause, because the King’s Attorney General had not signed a Warrant for a *Tales*, though the *Bishop’s Attorney General* had. And the following Year, a Cause was tried upon a Warrant signed by the *King’s Attorney General only*; though the *Bishop’s Attorney General* was present in Court.

The Counsel for the Defendant argued That the *Tales* was *not regular* in itself, *nor regularly applied for*; and that it *could not* be annexed to this Jury-Process, which is only a *Venire facias* (without any *Habeas Corpora*)

The

The *old Tales* at Common Law remains, in all Cases not described in 35 H. 8. c. 6. which gives the *Tales de Circumstantibus* in certain particular Cases only; of which, this is not One.

They said, It does not extend to Trials at Bar, nor to Justices of Assize, nor to Counties Palatine, nor to Criminal Cases: It only extends to *civil* Suits, and where Issue is joined at *Westminster*. And they cited *Alfridus Denbawd's Case*. 10 Co. 102. The Statute of 4 & 5 P. & M. c. 7. extends it to criminal Causes where Issues are joined at *Westminster*. Then 5 Eliz. c. 25. extends it to the Counties Palatine as to *civil* Suits; but not to *criminal* Suits. Therefore the Counties Palatine still remain as at *Common Law*; and as *Trials at Bar* still stand: And no *Equity* can extend this Statute to them, as to *criminal* Suits.

But if a *Tales* had been allowable in this Case, the Warrant ought to have been signed by the *Attorney General of the County Palatine*—Though all Writs run in the Name of the Crown, yet the *Bishop* names all the Judges and Officers: And they have the same Authority there, as other Judges and Officers have in other Counties. Causes go down to Trial here, by *Mittimus*: But the Record is not sent with it, nor is any Jury-Process sent with it. All *that* is done in the County Palatine: And the Bishop's Attorney General does every Thing there, that the King's Officers do in the County at large.

This Trial is upon a *Venire facias*: And the *Tales* is annexed to the *Venire facias*. But 2 Lord Raym. 1169. per Holt—"A *Tales de Circumstantibus* can not be granted upon the *Venire facias*."

As to the two Cases cited by Mr. Wallace—One of them was, "that Both Attorney Generals together could not give a Warrant for a *Tales*." But that was a single Case; and many were dissatisfied with it. The Attorney General of the Bishop does, in fact, exercise this Authority: And this is a Mis-trial for Want of his Warrant.

LORD MANSFIELD—As to the *Tales*—At present I think that, as this is an *Issue joined at Westminster*, and the King's Officer prosecutes it, the Warrant for the *Tales* must follow that; and the King's Attorney is to sign it.

Mr. Justice YATES concurred: And that there was no Need of the Aid of the Statute of 5 Eliz. c. 25. to impower the granting a *Tales de circumstantibus* in the Counties Palatine. The Judges of the Counties Palatine have the same Authority as the King's Judges of *Nisi prius*: And the *Posse* is to be returned in the same Manner as from other Judges of *Nisi prius*.

As to Trials at Bar—The Reason is very different: There is a proper Method of proceeding to try it by a *Tales*; namely, a Writ of *Decem Tales*; which can not be on Trials at *Nisi prius*.

As to the *Bishop's* Attorney General—He shall not have Power to contradict the *King's* Attorney General, and to say “it shall not be tried:” Which might be the Case, if He was to grant the Warrant, instead of the *King's* Attorney General.

Mr. Justice ASTON and Mr. Justice WILLES were of the same Opinion.

Fer CUR.

RULE DISCHARGED.

Saturday 6th
Feb. 1768.

Hague and Others, Assignees of Anne and Isaac Scott,
Bankrupts, *versus* Rolleston.

THIS was a Motion for a new Trial, in an Action of Trover brought to Recover the Value of seven Bags of Cochineal.

It had been tried before Lord *Mansfield* at *Guildhall*; and a Verdict found for the Plaintiffs: But a Point of Law arose on the following Facts.

Anne and *Isaac Scott* were Merchants and Copartners. On the 27th of *March* 1767, *Isaac* went out, with Intent to abscond; and did not return till after a Commission of Bankruptcy had issued against him. On the 30th the Defendant received a Letter written by *Isaac Scott*, dated “*Dover* 28 *March*,” inclosing a Bill of Parcels, dated 23d *March*, of seven Bags of Cochineal, for 1645*l.* 14*s.* 6*d.* as if the Defendant had purchased the same of the said *Anne* and *Isaac Scott*; and informing the Defendant “that He (*Isaac Scott*) was gone off,” and “that He had deposited the seven Bags of Cochineal at *George Street's* Warehouse, in *Rolleston's* Name and for his Use;” though, in Fact, He had not purchased or agreed to purchase any such Goods of them: But the Defendant imagined, it was intended to secure him in Part of the Debt due from the Partnership. On the 30th of *March*, the Defendant went to the Warehouse of *George Street* in *Thames Street*, which was a public Warehouse; where He found the seven Bags of Cochineal deposited there in his Name: Which He sold and disposed of, and applied the Money to his own Use

Use in Part of Payment of the Debt due from them to him. They had been deposited there with *Street*, on the 26th of *March*, for the Defendant *Rolleston*. On the 25th *Isaac Scott* told *Street*, "that they were for the Defendant:" And they were *so booked* at the Warehouse. But though the Goods were *sent* to the Warehouse *before Isaac Scott's* Act of Bankruptcy, (*viz.* his absconding and not returning;) yet the Defendant did not then know that they were there: And He did not *declare his Acceptance* of them, till *after* that Time.

The Plaintiffs were Assignees in a joint Commission which afterwards, on the 12th of *April*, issued against Both the *Scotts*, *Anne* and *Isaac*.

Sir *Fletcher Norton* and Mr. *Dunning*, Solicitor General, insisted that the Defendant was intitled to retain the *Moiety* belonging to that Partner who did not become Bankrupt till after *Rolleston* had declared his Acceptance of the *Cochineal*; though there was *afterwards*, a joint Commission against Both.

This Act of *Isaac* bound *both* Partners. His subsequent Bankruptcy could only affect his *own* Share in the Partnership Estate: It could not affect the Mother's. *Rolleston* stands in the Place of the Mother: And before her Bankruptcy, He was *joint Partner* with the Assignees of *Isaac* in this *Cochineal*; and had an UNDIVIDED *Moiety* in it.

Besides, a Trader may prefer one Creditor to Another, *before* any Act of Bankruptcy. And here is no Fraud or Collusion in the Defendant. Consequently, the *joint* Assignees against Mother and Son can not maintain this Action of *Trover* against *Rolleston* for the *Whole* of these Goods.

Mr. *Morton* and Mr. *Wallace*, *contra*, for the Assignees under the joint Commission.

The Mother's *Moiety* was bound by *Isaac's* Bankruptcy. All the *joint* Effects are bound by the Bankruptcy of *either* Partner. The Messenger under the joint Commission of Bankruptcy might have seized the *Whole*, if they had remained in their Warehouse.

Such a Delivery as this was, under a private Order of *Isaac*, unknown to *Rolleston* and unknown to *Anne Scott*, was no Sale to *Rolleston*. The Goods were not appropriated to him, till *after Isaac Scott's* Bankruptcy: And *after* his Bankruptcy, He had no Right to sell. He could not, *after* that, bind the Partnership Effects. *Rolleston* took the Goods UNDER the *Bill of Parcels* which was sent by *Isaac* from *Dover*; at *which* Time He was a Bankrupt:

Bankrupt: And consequently, *Anne Scott's* Share was liable to be seized under the Commission against *Isaac*.

On the other Side, it was urged in Reply, that *Isaac Scott* had, at the Time of the Act done, a Right to dispose of the Goods: His Act was the Act of *both Isaac and Anne*. His subsequent Bankruptcy only rescinded *his* Interest, but leaves *Anne's* Interest in *Rolleston*. The Assignees of *Isaac*, and She, were Tenants in Common of the Goods. The Court must consider it as if *Anne* had never become a Bankrupt: For *Rolleston* stood in her Place. The Act of *Isaac*, when both Partners were solvent, was the Act of *both* Partners, and bound *Anne's* Share as well as *Isaac's*. Therefore her subsequent Bankruptcy signifies Nothing: For her Assignees can only stand in her Place. *Street's* Warehouse was a public Warehouse. And as soon as *Rolleston* signified his Assent to the Contract, it was perfected. Indeed *Isaac's* Share was gone, by his prior Bankruptcy: But as to *Anne's* Share; the Contract was perfected, and *Anne's* Share was bound by it: And on the 30th of *March*, (which was prior to *Anne's* Bankruptcy,) *Rolleston* was intitled to *her* Share.

Lord MANSFIELD — Under a joint Commission, the Commissioners assign the Effects of *Both*. On an Application *ex parte Turner*, in *March* 1742, it was holden, that the joint Commission carries *All* the Effects, both joint and several*.

* In 1 Atkyns
97 the forty-
fifth Case is ex

parte *Turner*: But the Date of it is August the 14th 1742. "That where there is a joint and separate Commission, a Creditor under the joint may come under the separate, and assent or dissent to the Certificate under the separate."

Consider, here, the Effect of booking the *Cochineal* on 26th *March*, in the Name of *Rolleston*; and whether it does not go to the Whole. And the subsequent Assent, if it does any Thing, must go to the Whole. The Assent could not be good for Part; and not good, for the other Part.

But the Assent was to Nothing at all. The Deposit was not completed, antecedent to the 30th of *March*. I was clear at the Trial, that this Assent could not be good for the Whole; because there was Nothing to assent to: Nor did *Rolleston* in Fact assent to any Thing but the false Bill of Sale sent to him from *Dover*. And that Bill of Sale was after the Act of Bankruptcy committed by *Isaac Scott*. Therefore He could not then affect the Partnership; which was at an End, by the Bankruptcy. And *Rolleston's* Assent was to this false Bill of Sale, sent to him to make him a Creditor upon a false Foundation of a Dealing upon Speculation.

Mr.

Mr. Justice YATES—*Isaac's* Contract must *bind the Whole*, or *not operate at all*: It could not be good for one Part, and not for the Other. His Act was *not complete* upon the 26th *March*: It was *revocable* till *Rolleston's* Assent; and He must assent to the *whole* Contract, if He assented at all. All *Isaac's* Power was gone, when He wrote from *Dover*. His Act of Bankruptcy dissolved the Partnership.

The Assignees of *Isaac* could never be said to be Partners with *Anne* the other Partner. The Transaction is void, and seems a Fraud: There is no Account stated; a voluntary Deposit is made, to favour *Rolleston*. Therefore *Isaac's* Act was void, and had no Effect on the Moiety belonging to *Anne*.

Mr. Justice ASTON and Mr. Justice WILLES were of the same Opinion.

Per CUR'.

RULE (to shew Cause why the Verdict should not be set aside, and why there should not be a New Trial,)

DISCHARGED.

See more on this Subject, in the Case of *Harman and Others*, versus *Fisher*, determined on 14th *June* 1774; upon the Preference attempted to be given by Mr. *Fordyce* to Mr. *Fisher*, One of his Creditors.

Thompson *versus* Hervey, Esq.

ON shewing Cause against a Motion for a New Trial, in an Action brought against the Honourable Mr. *Thomas Hervey*, (second Son of the late Earl of *Bristol*, and Uncle to the present Earl,) for Lodging and Necessaries for his Wife, during her Residence at *Bristol*, (which her Health absolutely required;) wherein a Verdict had been given for the Plaintiff, against Mr. *Hervey*; It appeared from Lord *Mansfield's* Report, who tried the Cause, and repeated the Evidence, that She had Herself paid Part of the Money, *viz.* what was due to the Plaintiff for the former Part of the Time; and that She had a Pension, *during Pleasure*, from the Crown, determinable at the Will of the Crown, of 300*l.* a Year, granted to Her in her *own* NAME, but *not* by any Agreement or *otherwise* appropriated at all to her *own* Use. That at her Return from *Bristol*, her Husband shut his

Doors against Her. That Mr. *Hervey* had *never* made or agreed to make any separate Allowance to Her, or had contributed any Thing towards her Support, since He had so shut his Doors against Her; nor had She any Use of his Table, Servants, or Equipage. And there was Evidence given of his being reputed to have an Income of about 1800*l. per Annum.*

THE COURT were extremely clear, that the Husband (Mr. *Hervey*) was *liable* to this Action; and that the Verdict obtained against Him ought *not* to be set aside.

Here is no Agreement for a Separation: But He has sent Her adrift, by shutting his Doors against Her. He allows Her no separate Maintenance, nor any Support at all. And there is no Pretence of this Lodging and other Support provided for Her by the Plaintiff, being improper for her Degree and Condition of Life. And as She had no Maintenance from her Husband, nor Admittance into his House, She was obliged to procure Lodging and Maintenance somewhere else. Every Man is obliged to maintain his Wife.

The Pension is only a *voluntary* Grace and Bounty of the Crown, and only during the *Pleasure* of the Crown; not what any Creditor of Her's, even for her necessary Subsistence suitable to her Degree and Rank of Life, can be supposed to give her Credit upon.

Per CUR'. unanimously—

RULE DISCHARGED.

See the Case of *Manby* versus *Scott*, in 1 *Siderfin* 109. 1 *Lev.* 4. 1 *Mod.* 124. and other Books. See also 1 *Lord Raymond* 444. *Todd* versus *Stokes*, and the Case of *Longworthy* versus *Hockmore*, there cited.

Monday 8th
Feb. 1768.

Rex versus Inhabitants of Great Bedwin.

See this Case at large, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 188. Page 584. and abridged in the Table to that Book.

Rex

Rex *versus* Lord Baltimore;

Friday 12th
Feb. 1768.

Rex *versus* Anne Darby;

Rex *versus* Elizabeth Grieffenburgh.

THE Two Women were brought up by *Habeas Corpus*; and appeared (upon the Return) to be committed for being *assisting aiding and abetting* to Lord *Baltimore* in *feloniously ravishing and carnally knowing* *Sarah Woodcock*, Spinster. They were committed as being charged upon the Oath of the said *Sarah Woodcock*, for being feloniously assisting aiding and abetting Him in feloniously ravishing and carnally knowing Her against her Will and Consent, against the Form of the Statute. But they were not charged, either by the Oath or Warrant of Commitment, with being *present*: And therefore they were agreed to be only Accessary before the Fact.

The Counsel for the Prosecutrix, declaring “that the Prosecution was carried on merely for the Sake of public Justice, “and that They had no other Wish than to obtain it;” declined either to consent to or oppose Lord *Baltimore*’s being bailed; but left it entirely to the Discretion of the Court, to act as They should think proper; as their sole Point in View was that his Lordship should be, at all Events, amenable to Justice.

Lord MANSFIELD approved of their Conduct. At the same Time, He observed that Lord *Baltimore*’s voluntary Surrender was a strong Indication that He had no Intention of absconding from Justice: The Probability whereof was greatly heightened by the large Property which He was known to possess; of which He would incur a Forfeiture, by running away.

Therefore—Let him be bailed by four Manucaptors, in 1000 *l.* a-piece; and Himself, in 4000 *l.*

And let the two Women be bound in 400 *l.* Each; and their Securities (All of them together) in the like Sum.

Accordingly—Lord *Baltimore* entered into a Recognizance in 4000 *l.* and four Manucaptors, in 1000 *l.* a-piece.

Anne Harvey (committed by the Name of *Darby*) in 400*l.* and her four Bail in 100*l.* Each.

And *Elizabeth Grieffenburgh's* four Manucaptors (She being a married Woman) in 200*l.* a-piece.

The Condition of the Recognizances was "to appear at the
" next Affizes and General Gaol-Delivery for the County
" of *Surrey*."

Sulyard versus Harris.

THIS Case was a Point of *Practice*, about delivering a *Declaration by the By*.

It was a Suit by Bill, against *Harris*, by Two Persons, named *Sulyard*. *Harris* was served with a common Process, not requiring Special Bail. He appeared at the Return of the Process, and filed Common Bail. The next Day, *Edward Sulyard alone*, One of the two Plaintiffs, without his Companion, delivered a Declaration by the By, against the Defendant. And the Defendant obtained Mr. Justice *Yates's* Order to stay Proceedings.

Sir *Fletcher Norton* argued on behalf of the Defendant. He said, All Process must be *served*. Now here is *no* Service of Process at the Suit of *Edward Sulyard alone*.

If the Appearance had been entered by the *Plaintiff's* Attorney, under the Statute, it had related only to Plaintiff and Defendant in that Suit.

Here the Defendant appeared, *Himself*: And He shall not be in a *worse* Case, for doing so. Yet He would be so, if all Mankind might deliver a Declaration against Him.

There is a great Difference between being in *actual* Custody of the Marshal; and what is only *legal* Custody. In the latter Case, None but that same Plaintiff can declare against Him.

In the Case of *Reeks et Ux'. versus Robins*, *Trin.* 10 G. 2. C. B. 1 *Barnes* 245. in 1st Edition; 337. in 4to Edition; it was held "that a Plaintiff can not declare by the By, *joined* with his
" Wife or any other Person:" And the Proceedings on the Declaration

claration by the By were stayed; there being no Process to warrant it.

The Rule of this Court, *M. 10 G. 2. 1736.* is, that where the Plaintiff files Common Bail for the Defendant, pursuant to the Act of 12 G. 1. c. 29. § 1. the Defendant is *not* in Court, as to any *other* Person's Suit, but only that of the *Plaintiff* who has so filed Common Bail for him.

Here, the Defendant is a *Volunteer* in appearing: There, He is *forced* into Court.

When He comes voluntarily into Court, He can not have a Declaration by the By filed against him by a *Stranger*. And here, the Plaintiff is a Stranger to the first Suit.

Mr. *Barnes, contra*—The Note of the Case cited on the other Side is in point for Us. It was allowed to be the Practice of the Court, “that the Plaintiff may, the same Term the Process is returnable, declare against the Defendant as often as He would, at his *own* Suit.” And that is the present Case. Here, the Plaintiff is *not* a Stranger to the Process; but *One* of the two Persons who brought the *Latitat*.

By *Lilly's Practical Register* 409 & 413. “If One be in the Custody of the Marshal, any One may deliver a Declaration against Him *de bene esse*.”

Lord MANSFIELD—I consider the Plaintiff as a *Stranger*, in the same Light that Sir *Fletcher Norton* has stated Him: But the Defendant was in Court, by having filed Bail in the former Action.

Mr. Justice YATES—The Custody of the Marshal is the Foundation of this Court's Jurisdiction: When a Defendant is in Custody of the Marshal, He is then present in Court. But this Man was not in *actual* Custody of the Marshal.

The MASTER (Mr. *Owens*) reported the Practice to be “That where the Proceeding is by *Bill*, if a Defendant is in Court, *either* by being in *actual* Custody of the Marshal, or by a *voluntary Appearance* at any Plaintiff's Suit, any *Other* Plaintiff is at Liberty to deliver a Declaration by the By against Him, *within* the same Term wherein the Writ was returnable.”

Lord MANSFIELD asked if the other Officers of the Court were of the same Opinion: And on their confirming it by their Own—

Per CUR'.

The RULE was made ABSOLUTE, for discharging the Judge's Order.

The End of *Hilary* Term 1768, 8 G. 3.

ADDENDUM TO THIS TERM.

NOTE—The Name of the Case mentioned to be adjudged in the Exchequer (*ante*, p. 2171.) was *Christopher* against *Christopher and others*, upon the Will of *Daniel Christopher*; who had made a Will in the Time of a former Wife, who died without Issue; and he married a Second Wife, by whom he had Issue, the Plaintiff in the Exchequer. The Decree was made on *Saturday* 6th *July* 1771. The Court declare therein, “That the
“Testator's second Marriage, *and having Issue* by that Marriage,
“is a *total Revocation* of the *aforesaid* Will made by the said
“*Daniel Christopher* in 1757;” and thereupon order adjudge and decree “that the said Plaintiff is well intitled to the said several
“*Real Estates* the said *Daniel Christopher* died seised of.”

Easter

Easter Term

8 Geo. 3. B. R. 1768.

THE late MARSHAL having died in the Vacation, a new Wednesday
 One was, this Day, sworn in; who was appointed by 20th April
 the *Crown*, pursuant to the Statute of 27 G. 2. c. 17. 1768.
 made “for *revesting* in the Crown the Power of Ap-
 “pointing the Marshal of the Marshalsea of the Court of King’s
 “Bench; and for the better Regulation of that Office, and of the
 “inferior Offices thereunto belonging; and for rebuilding the
 “King’s Bench Prison.”

BEFORE this Time, the Appointment had been in *private*
 Persons. See the Preamble of this Statute; which recites a
 Grant of King *James* the First to a private Gentleman his Heirs
 and Assigns, and all the mesne Conveyances and Mortgages of
 this Office: After Payment of a Composition for which Mort-
 gage-Monies and Interest, the Act **revests in the Crown* the Site • Sect. 2.
 of the Prison and the Power of granting the Custody of it, and
 the Office of Marshal; to remain for ever thereafter unalienable.

Mr. *Ashton*, who had been sworn in upon the 21st of *May*
 1747, on the Death of Mr. *Richard Mullens*, was thereby con-
 tinued in his Office †.

† Sect. 3.

On whose Decease, the King now appointed *Benjamin Thomas*
 Esq. to succeed him.

This Appointment was by *Sign-Manual*, countersigned by
 Lord *Weymouth*, Secretary of State: Which recited the Vacancy
 of the Office, by the Death of Mr. *Ashton*; and that by the Act
 of 27 G. 2. it is in the Nomination and Appointment of the
 Crown, by Letters Patent or Sign-Manual; and the Importance
 of it to the Suitors and Prisoners; and that Lord MANSFIELD,
 Lord Chief Justice of the King’s Bench had recommended Mr.

Thomas, as a Person fit and every Way qualified to execute it. Whereupon the King nominates constitutes and appoints Him to be Marshal of the Marshalsea of this Court; and grants to Him the said Office; and all Fees Perquisites Profits Powers Privileges and Advantages thereto belonging, together with the Custody of the said Prison and the Prisoners thereto committed; To have exercise and enjoy, *so long as he shall behave well in it*, and shall be *resident* in the said Prison or within the Rules thereof. Dated at *St. James's*, 23d March 1768, *Anno Regni octavo*.

Note—The fifth Section is express, “that the Grantee shall
“ have hold and enjoy for and during so long Time as He shall
“ behave himself well in his Office, and shall be resident in the
“ said Prison or within the Rules thereof, *and no longer*: And
“ all Grants of the said Office shall be made accordingly; or,
“ otherwise, shall be void.”

Mr. *Thomas* had before been sworn in at Lord MANSFIELD'S House, upon the 25th of *March*.

He took the Oath of *Office* on his *Knees*, both then and now.

The Oath of Office was as follows—

“ You shall swear, that during the Time that you shall exercise the Office of Marshal of the Marshalsea of our Sovereign Lord the King, of this Court, you shall well and truly, in all Respects, to the uttermost of your Power and Knowledge, use exercise and behave yourself in the same Office; you shall increase no Fees, but shall content yourself with the ancient Fees of the Court belonging to your Office; and in all Things that do or shall appertain to the Duty of your Place, in Execution of your said Office, you shall truly and honestly demean yourself.

“ So help you G O D.”

Saturday 23d
April 1768.

Rex versus Inhabitants of *Gainsborough*.

See this *Case at large*, and also *abridged*, in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 189. Page 586.

Ex

Ex Parte Prisoners in the Custody of the Marshal.

THE Prisoners who had given Security to the * late Mar- * V. ante, P. 1289.
shal, applied by Petition for the Directions of the Court
with Regard to their giving *fresh Security*.

Per Cur'.—Let the Petitioners be at Liberty to give a *new*
Security to the present Marshal.

Mr. Solicitor General took this Opportunity of mentioning,
“ that the Security given by the TIPSTAVES was *too little*.” It
is only 300*l.* Each: Whereas they may happen to have the
Custody of Prisoners charged with 10000*l.* and they are, by
27 G. 2. c. 17. *sect.* 10. to give such Security as the Court shall
direct.

BUT THE COURT observed that the Tipstaves held their
Places, at present, for their *Lives* (though liable indeed to
Amotion upon Misbehaviour;) and had *purchased* them before
the making of this Act: And therefore it would be too hard
upon the *present Possessors* of these Offices, to require a *greater*
Security than had been usual.

THE COURT, at the same Time, made the *general* Order
always, or at least usually, made upon the Appointment of a new
Marshal.

Mr. Owens, Secondary of the King's Bench Office, read
some old Rules of this Kind: *viz.* One in 4 *Jac.* 2. on
the Succession of *Philpot*; and another in *H.* 11 G. 1.
The former run—“ Qd'. capiat in Custodiam suam
“ omnes Prisonar' qui sunt ad largum extra Prisonam;”
And, “ Qd' capiat in Custod' suam omnes Prisonar' qui
“ sunt in Regulis:” The latter—“ Qd' recapiat omnes
“ Prisonar' qui fecerunt Escap' à Prison' Mar' et non le-
“ gitimè exonerentur è Prison' pred'; et ducat eos in Pri-
“ sonam predict'.”

LORD MANSFIELD ordered a *like* Rule to be drawn up *now*:
Which, on Deliberation, was thus settled—It is ordered
that *Benjamin Thomas*, Esq. the present Marshal of the
Marshalsea of this Court do take into his Custody All the
Prisoners who are at large without the Walls of the Pri-
son of the said Court; and also All Prisoners who have
PART IV. VOL. IV. X x X escaped

escaped and are not lawfully discharged out of the said Prison; and bring them into the Prison aforesaid.

On the Motion of Mr. SOLICITOR GENERAL.

Wednesday
27th April
1768.

Rex *versus* Doctor Askew et Al'. Censors of the College of Physicians.

IT would require a VOLUME, to give a full and particular Detail of this long Contest between the Fellows and the Licentiates; which was litigated with great Spirit and Eagerness between several very learned and respectable Gentlemen of the Faculty, on both Sides. It must not therefore be attempted, within the Compass of a Collection, already perhaps too faulty in this Respect; as being, in many Instances, more minute and circumstantial than may appear absolutely necessary, or at all agreeable to some Readers.

The *Substance* of it, however, ought not to be omitted: Which was as follows.

A Rule had been obtained, upon the Application of Dr. *Letch*, for the College of Physicians to shew Cause why a Mandamus should not issue, directed to them, commanding them to admit JOHN LETCH Doctor of Physic, to be a *Member* of the College.

This Rule was made upon the whole Body of the College or Community of the Faculty of Physic of the City of *London*; and also upon the President and Censors of the said College.

On *Thursday* 7th May 1767, Mr. *Yorke* shewed Cause against this Rule; and Sir *Fletcher Norton* argued in Support of it.

The short State of the material Facts, with Respect to this Mandamus, was—That Dr. *Letch*, who practised as a Man-Midwife, was summoned by the College, to be examined. He thereupon came in; and was examined thrice at the *Comitia minora*: And after the third of those Examinations, he was there ballotted for, “Whether he should be *approved of by them*, or “not.” A Dispute arose upon this Ballot. The *Majority* of the Number of Balls *appeared* to be for approving him: But One of the Censors declared “that he had by *Mistake*, put in “his Ball FOR Approbation; which he meant and intended to “be AGAINST approving him.” It was proposed “to ballot “over again.” But the President considered and declared this to be

be an Approbation by a *Majority of Votes* on the Ballot. On Dr. *Letch's* being proposed to the *Comitia majora*, nineteen to three of the Members present were *against* putting the College-Seal to his Letters testimonial: And he was informed "that he was NOT *elect*ed."

His Counsel insisted, that having been returned sufficient by the *Comitia minora*, he had thereby acquired an inchoate Right to Admission; which the Court would enforce the Completion of, by Mandamus.

In this Argument, the Charter of the College appeared to bear Date on 23d *September* 10 *H. 8.* (1518.) And the following Statutes were mentioned; 3 *H. 8. c. 11.* and 14 & 15 *H. 8. c. 5.* And some By-Laws or Statutes of the College: Particularly, Caput octavum, "*de Comitibus majoribus*," and Caput decimum quartum. The former says—"Comitia vocamus Congregationes illas licitas et honestas, quas ut Præsidentis et Collegium sive Communitas et eorum Successores de Seipsis habeant, Rex *Henricus* concessit. Ordinaria autem sive statuta Comitia, *Majora* dicenda, quater Anno celebrentur, &c. In Comitibus *majoribus* fiant ELECTIONES et Admissiones Sociorum, Candidatorum et Permissorum. Quod verò ad Candidatorum et Permissorum Examinationes attinet, Eæ fieri possint vel in Majoribus Comitibus, vel in Minoribus et Censoriis, pro Arbitrio Præsidentis aut Propræsidentis et Censorum, aut eorum Partis majoris." The Caput decimum quartum (de Examinationum et Admissionum forma) enacts—"ANTEQUAM quispiam aut in Candidatorum ordinem, aut ad Medicinæ Facultatem in Urbe *Londino* et per septem Millaria in Circuitu ejusdem exercendam admittendus proponatur, *examinetur in tribus Comitibus*, sive Majoribus sive Minoribus, pro Arbitrio Præsidentis aut Propræsidentis et Censorum, aut eorum majoris Partis, &c. Omnes hæ Examinationes fieri possunt in Comitibus *minoribus* sive Censoriis, à Præsidente aut Propræsidente, et quatuor Censoribus; aut (uno ex Censoribus absente) à Præsidente aut Propræsidente, tribus Censoribus, et absentis Censoris Vicario. Liceat tamen *cuique* Socio, pro arbitrio, disputare et periculum facere quantum Examinandus in Re Medicâ valeat. Qui ad hunc Modum examinatus, et à Præsidente aut Propræsidente et Censoribus aut eorum *majori Parte* (Suffragiis per Pilas occultè acceptis) *approbatus* fuerit, in Comitibus *majoribus* *proximè insequentibus*, siquidem commodè fieri poterit, si minus, in Comitibus *quibuscumque* *Majoribus*, sive ordinariis sive extraordinariis, à Præsidente aut Propræsidente PROPONATUR in Candidatorum ordinem vel Permissorum numerum ADMITTENDUS: Et si *electus* fuerit, peractis iis ab ipso quæ per Statuta nostra requiruntur, quam primùm ADMITTATUR."

Some

Some Cases were also cited in the Course of the Argument : The Case of Corporations, in 4 Co. 77. b. 78. a. Dr. Bonham's Case, in 8 Co. 114 to 121. Dr. Goddard's Case, in 1 Lev. 19. 1 Siderf. 29. and 1 Keb. 75, 84. S. C. upon a Mandamus to the College, to restore Him. Dr. Groenvelt's Case, in Cartbaw 491. 1 Salk. 144, 200, 263. 3 Salk. 265. 12 Mod. 119. and Holt 184. and Dr. Scomberg's Case.

The next Day, the Argument was continued ; by Mr. Ashurst and Mr. Dunning, for the College ; and Mr. Morton, Serjeant Glynn, and Mr. Wallace, for Dr. Letch.

LORD MANSFIELD said, He had no Doubt what ought to be done : And therefore he would not keep the Gentlemen of the Faculty any longer in Suspence.

The Counsel for the College have admitted the *Jurisdiction of this Court* : And they certainly have Jurisdiction over Corporate Bodies, to see that they act agreeably to the End of their Institution.

There is no Doubt that where a Party, who has a *Right*, has *no other* specific legal Remedy, the Court will assist him by issuing this prerogative Writ, in Order to his obtaining such Right*.

* V. ante,
1045 & 1266,
1267 and
1659, 1660.

There can be as little Doubt, that the College are *obliged*, in Conformity to the Trust and Confidence placed in them by the Crown and the Public, to *admit All* that are *fit* ; and to *reject All* that are *unfit*. For, under the Reason and Spirit and true Construction of this Charter and this Act of Parliament, No Person ought to be *suffered to practise* Physic, *but Such only* as have Skill and Ability, and have diligently applied themselves to the Study, and are well grounded in the Knowledge of it : And, on the other Hand, *All* Persons who *are so qualified*, and have bestowed their Time and Money and Labour in the proper Studies that tend to such Qualifications, have a *Right* to be admitted to exercise and practise their Profession. And the *Public* have also a *Right* to the Assistance of such a Person, who has by his Labour and Studies rendered himself capable of serving the Public by giving them proper Advice and Directions.

It is true, that the Judgment and Discretion of *determining* upon this Skill, Ability, Learning, and Sufficiency to exercise and practise this Profession, is trusted to the College of Physicians : And this Court will not take it from them, nor interrupt them in the *due and proper* Exercise of it. But their Conduct in the

the Exercise of this Trust thus committed to them ought to be *fair, candid, and unprejudiced*; not *arbitrary, capricious, or biassed*; much less, warped by *Resentment, or Personal Dislike*.

Cases indeed *may* happen, where the Rejection may be founded upon *other* Grounds than Insufficiency in Point of Skill and Ability or Knowledge: It is possible, that other Causes of Rejection may occur; as *Badness of Morals*, for Instance.

But in the present Case, they seem to have acted with Candour and Caution. Some of the Gentlemen even make Oath of their Reasons against admitting this Candidate for a Licence. Objections to Persons applying for Licences to practise Physic, may be grounded on a Variety of Reasons: And the Court are to judge of such Objections and the Reasons of them. If they are insufficient, the Court may grant a Mandamus. If they should refuse to examine the Candidate, at all; the Court would oblige them to do it. In a Manuscript Book of Reports which I have seen, the Reporter cites (in reporting Dr. Bonham's Case) a Mandamus in the Time of *Edw. 3.* directed to the University of *Oxford*, commanding them to restore a Man that was *bannitus*: Which shews both the *Antiquity* and *Extent* of this Remedy by Mandamus. But the Court ought to be satisfied that they have *Ground* to grant a Mandamus: It is *not* a Writ that is to Issue of *Course*, or to be granted *merely for asking*.

The Question therefore is, "Whether here is a *proper* and *sufficient* Ground for our granting a Mandamus."

Consider, then, what are the Grounds of this Application.

First—Dr. *Letch* can't dispute these By-Laws. This Point is not open to him. For, *without them*, he has no Ground to stand upon: He has never been examined by the Body at large. Therefore he is under a Necessity, upon *this* Application, of *allowing* the By-Laws to be good.

The Question then will be, "Whether the Power is *DEVOLVED on the President and four Censors*; or *REMAINS with the Body at large*."

I am clear, that the Power *remains* with the *Body*; and that the Examination by the President and four Censors is *only preparatory*, and for the Ease of the Body at large.

There are various Instances of *Delegations* of a like Kind. *Bishops* refer Examinations of Clergymen to their *Chaplains*:
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So *Universities* refer Examinations to select Parts of their Bodies. But the *dernier Determination* is in the Body at large.

These Censors, to whom this Examination is referred, take an *Oath*, "not to approve of unfit Persons, nor reject such as are fit."

The *Usage* has been, to refer the Examination of the Person applying for a Licence, to the *Comitia minora*, as more easy, and more convenient to be executed by a small than by a large Number of Examiners. But *every Fellow* has Notice of it, and may examine and argue with the Candidate; though he has no Vote at these *Comitia minora*: So that every Fellow has an Opportunity of informing Himself and satisfying his own Judgment concerning the Sufficiency of the Candidate. The *Comitia minora* have no Power, upon their Approbation, to admit the Candidate: They have only Power to approve. If they do approve, then the Person so approved of by them is to be afterwards proposed to the *Comitia majora*, for Election: And if, upon being so proposed, he shall be elected, then he is to be admitted.

Supposing the *Comitia majora* to execute their Power corruptly, (taking this Word in a large Sense;) and that they should refuse to admit a Person who had been examined, approved, and regularly proposed to them, without being able to deny his Fitness; this Court ought indeed, in such a Case, to interpose.

But that is not pretended or even hinted to be the present Case, with Respect either to the *Comitia majora*, or the *Comitia minora*. Dr. Letch charges them with Nothing of this Kind, nor with any Thing to which it is requisite for them to give an Answer: His Counsel rely on the *Usage*.

The Question therefore is, "Whether the *Comitia majora* have acted corruptly."

Now, they have only referred him to a second Examination, in future: They have not absolutely rejected him.

At the *Comitia minora*, there were Three who in Truth meant and intended to ballot against Dr. Letch, though One of them made a Mistake and ballotted for him; which Mistake was declared and taken Notice of, at the very Time; and it was proposed to ballot over again: And this was disclosed to the *Comitia majora*.

This Fact (of a Mistake in the Ballot for Approbation) being disclosed to the *Comitia majora*, was it not extremely reasonable for

for them to refer the Candidate to a *further Examination*? I see no Injustice in this, The Intention of the Ballot was that he should be *reported unfit*: And two of the Censors now swear "that they *thought him so*."

I am satisfied, that the *Comitia majora* had the Power of rejecting him: And it does not by any means appear, that they have acted upon improper Grounds, or arbitrarily and capriciously.

Here is *no Ground* laid for demanding a Mandamus.

His Lordship concluded with a Recommendation to the College, to settle all other Matters *amongst themselves*, without coming to this Court: At the same Time intimating to them a Caution against *narrowing* their Grounds of Admission so much, that if even a *Boerhaave* should be resident here, he could not be admitted into their Fellowship.

Mr. Justice YATES thought that Dr. *Letch* might more properly have applied for a Mandamus requiring the College to grant him a Licence to practise within *London* and seven Miles of it. However, if he had laid a *sufficient Ground* for his present Application, and shewn the Court "that he had a RIGHT to be "a Member of the College," the Court ought to grant him a Mandamus, to enable him to *obtain that Right**, if he had no other legal Method of coming at it.

* V. ante,
1245, 1266,
and 1659,
1660.

But he has *not* laid a sufficient Ground for this Application: He has *not* shewn that he has a RIGHT to be admitted a *Member* of the College. And we ought not to issue a Mandamus requiring the College to admit him a Member; unless he first shews Us "that he has a *Right* to such Admission."

No Man can now practise Physic, *until* he shall have been examined and approved of, proposed, elected, and admitted. He can't be a MEMBER of the College, till *all* these Requisites shall have been completed in him.

This Gentleman has been examined, it is true, by the President and four Censors; and their Ballot was in his Favour, Three to Two, as to their *Approbation*: But *One* of them declared, at the Time, "that he *meant and intended* his Ballot to "have been in "*Disapprobation*." The President, however, considered him as *approved by the Majority*.

BUT the Determination of the *Comitia minora* is *not* FINAL: The Consequence of their Approbation is *only* "that he is to be
" afterwards

“ afterwards *proposed* to the *Comitia majora*, for Election; and
 “ if they *elect* him, then he is to be admitted.”

The TRUST was placed in the *whole* BODY. The College could not *delegate* this Trust placed in the *whole* Body, to this select Part the *Comitia minora*, so as to make their Opinion *final*: But it was lawful for the College to delegate to them this Power of *preparatory Examination*; reserving to the *whole Body* the Right of *final* Judgment and Determination. Neither have the College in Fact delegated the *final* Judgment to the *Comitia minora*: They are *only* to examine and approve. The Candidate, if he meets with *their* Approbation, must still be *proposed* to the *Comitia majora*; and is to be *elected* by *them*. So that it is the *Comitia majora*, who are to judge and to *elect*: Theirs is the *final* Determination.

The *Mistake in the Ballot* at the *Comitia minora* might be a Ground for the *Comitia majora* to judge “ that the Doctor had
 “ not satisfied the President and Censors of his Sufficiency to
 “ practise Physic:” For, though according to the strict Letter the Ballot might be said to have pronounced him sufficient, yet the Majority of those who balloted, thought and even *declared* otherwise.

Upon the Whole; as Dr. *Letch* has laid before Us *no* Ground for a Mandamus, there is no Reason for Us to grant him One.

Mr. Justice ASTON—The Question is, “ Whether Dr.
 “ *Letch* has laid a sufficient Ground for asking a Mandamus re-
 “ quiring the College of Physicians to admit him a *Member* of it.”

I agree with my Brother YATES, “ that he should rather have
 “ applied for a Mandamus requiring the College to grant him
 “ a Licence to practise Physic within *London* and seven Miles of
 “ it, than for a Mandamus to admit him a *Member*.”

No particular Method of Admission is *specified*, either in the Charter or in the Statute. The College have therefore instituted a Method; the Method which has been now disclosed to Us. And they have done right: It is a good and proper One. The Examination of the Candidate, by the *Comitia minora*, is *Part* of it: But their Opinion is *not final*. The *final* Determination is in the *Comitia majora*.

• Sect. pe-
nult’.

By the 14 & 15 H. 8. c. 5*. it is enacted “ that the *six* Per-
 “ sons named in the Letters Patent, as Principals and first named
 “ of the said Commonalty and Fellowship, choosing to them
 “ Two more of the said Commonalty, be called *Elects*; and that the
 “ same

“ same Elects yearly choose One of them to be President of the
 “ said Commonalty ; and as oft as any of the Rooms and Places
 “ of the same Elects shall fortune to be void by Death or other-
 “ wise, then the Supervivors of the same Elects shall choose name
 “ and admit One or more, as need shall require, of the most
 “ cunning and expert Men of and in the said Faculty *in Lon-*
 “ *don*, to supply the said Room and Number of eight Persons :
 “ So that He or They that shall be so chosen, be first by the
 “ said Supervivors strictly examined, after a Form devised by the
 “ said Elects ; and also, by the same Supervivors approved.” This
 shews, that the Makers of the Act of Parliament looked upon
 Those of the Faculty who resided in *London*, to be *Members* of
 the College.

The Power delegated to the *Comitia minora* is “ to examine,
 “ and to judge upon the Sufficiency of the Person whom they
 “ have examined ; and they are upon Oath to act impartially
 “ therein :” But their Opinion and Judgment are *not final*. The
Election is not any Part of their Power : It is in the *Comitia*
majora.

If the Person examined by them had been approved, proposed,
and elected ; then, indeed, a Mandamus would lie : And so it
 would, if the College should *refuse* to examine the Candidate
 at all.

But there are none of these Circumstances in Dr. *Letch*’s Case.
 He *has been examined* ; He has been proposed ; He has *not* been
elected : He has *never acquired* such a RIGHT as can be a Ground
 for asking a Mandamus.

And even as to the *Approbation* of the *Comitia minora*, upon
 their Examination of him—Though the Number of Balls seemed
 to indicate their Approbation of him, yet it is apparent that
 there was a *Mistake* in the Ballot : And it was *declared* at the
 Time. Now *suppose* that Mistake to have been the *contrary* Way ;
 and that the Censor who made this Mistake had *meant* to ballot
 FOR Dr. *Letch*, but had by Mistake *actually ballotted* AGAINST
him ; would it not have been thought a very hard Case, that this
 should be holden a *Disapprobation* of him ; and that he should be
 bound down by this Slip of the Censor, contrary to his Opinion
 and Intention, to an undeserved and undesigned *Rejection* ?

I think, the *Comitia majora* have behaved with great Candour
 and Moderation. They knew that the Majority of the *Comitia*
minora thought the Candidate *insufficient*. They refer him to
 further Examination, whenever he shall find or think himself
 qualified to undergo it. When he shall become properly quali-

fied he may be again examined; and being found so upon such second Examination, may be proposed, elected, and admitted in the due and regular Manner.

Mr. Justice HEWITT declined giving any Opinion
 * This Question had been started during the Argument: But the Court afterwards declared the Question to be *still open*. See the End of this Case, page

“ Whether *London-Licentiates* are * MEMBERS of the College, or not:” Though he hinted, that the more he thought of it, the more he doubted it.

The present Application is for a Mandamus commanding the College to admit him a MEMBER. It is not for obliging them to grant him a Licence to practise in *London* and within seven Miles round it. The Admissions into the College are “ *in Societatem nostram*.” The Others, only Licences to practise within these Limits.

Dr. *Letch* recognizes the *By-Law* or Statute of the College, and grounds himself upon it; claiming his Right of Admission, as arising from it: And upon this Right, he applies to be admitted a *Member* of the College.

I think, We should go a great Way, if We should say “ that a Licentiate to practise within *London* and seven Miles round is a MEMBER of the College.” Certainly, a Person not admitted can’t be meant as One of those that are incorporated.

But this Gentleman has not laid a sufficient Ground of *Right*, to support a Claim to *Admission*, within this *By-Law*.

It only reposes a *Trust* in the *Comitia minora*, “ to examine the Candidate.” If they approve of him, they are to report their Approbation to the Society or Body at large, the *Comitia majora*. Any Member may be present at the Examination; and ask the Candidate Questions, to try his Skill in Medicine. The Trust reposed in the *Comitia minora* relates only to his Skill in Physic: It does not extend to his *Morals*. They are not impowered to examine into *them*. The other Part of his Qualification they are to examine into; and if they approve, report so; but Nothing further: It is the *Comitia majora* who are to determine *finally*, and to *elect*.

Therefore, *without* entering into any *other* Points, I concur in the Opinion “ that this Rule ought to be discharged.”

THIS RULE was accordingly DISCHARGED by the unanimous Opinion of the Court.

Two Terms afterwards, *viz.* on Friday 20th November 1767,

Sir *Fletcher Norton* moved for a Rule upon Dr. *Askew* and others, (the four then Censors,) for them to shew Cause why an INFORMATION in Nature of a *Quo Warranto* should not be granted against them, to shew by what Authority they acted as Censors of the College of Physicians.

The Objection was, That whereas the Election ought to be by the *whole* Body, these Gentlemen had been *elected* only by a *select* Body; namely, by the Fellows, *exclusive* of the LICENTIATES; though the Licentiates *demand*ed Admittance; which was refused to them by the Fellows, on Pretence of their having no Business there, upon that Occasion.

It was argued on *Thursday* 21st April 1768, by Sir *Fletcher Norton* and Mr. *Morton*, for the Licentiates; and on *Monday* 25th April 1768, by Mr. *Yorke*, (then Attorney General,) Mr. *Dunning*, (then Solicitor General,) Serjeant *Davy*, Mr. *Ashurst*, and Mr. *Wallace*, for the College; and Mr. *Wedderburn*, for the Licentiates. On *Wednesday* the 27th, Serjeant *Glynn*, Mr. *Walker*, and Mr. *Mansfield*, proceeded, on behalf of the Licentiates: And on the same Day, the Court gave their Opinion.

LORD MANSFIELD took Notice, that the Figure and Consequence of the contending Parties, and the Respect due to them; the Anxiety that has appeared in the Contest; and perhaps the Spirit which has been raised on both Sides, in the Course of it; have carried the Counsel concerned into a very great Length of Argument, and into the Discussion of a Variety of Matter foreign to the Point directly in question before the Court upon the present Motion.

The Question properly now before Us is singly this—"Whether the Persons applying for this Information *are* Fellows, " and *intituled to vote* in the Election of Censors." If they are, the Election of these Censors, being made in *Exclusion* of their Votes, is *not good*: If they are not Fellows, and have no Right to vote in the Election of Censors, then this Election stands *unimpeached*.

I consider the Words "*Socii, Communitas, Collegium, Societas, Collega, and Fellows,*" as *synonymous* Terms; and every *Socius* or *Collega*, as a *Member* of the Society or Corporation or College. The Question is, "Whether these *Licentiates* ARE *Socii* or *Collegæ* or *Fellows*."

The *Facts* are not disputed: And there is no Doubt about the *Law*, as far as relates to the Question now before Us.

Here is a *Charter of Incorporation*. And it has been admitted on both Sides, that there has been a great Number of *By-Laws* and *long Usages*, which are agreed to appear upon their Books and the Extracts from them: And the Permission of these Licentiates "*to practise*" is not disputed.

But I doubt whether this *Permission to practise*, and these *Letters testimonial* can amount to an Admission into the FELLOWSHIP of the Corporation or College.

Nothing can make a Man a FELLOW of the College, without the *Act of the College*. The first Act to be done by them is their judging of the Qualifications of the Candidate. The Admission into the Fellowship is an Act Subsequent to that. The main End of the Incorporation was to keep up the Succession: And it was to be kept up by the Admission of Fellows after Examination. The Power of Examining and admitting after Examination, was not an arbitrary Power; but a *Power coupled with a TRUST*: They are *bound* to admit every Person whom upon Examination they think to be *fit* to be admitted, within the Description of the Charter and the Act of Parliament which confirms it. The *Person* who comes within that Description has a *Right* to be admitted into the *Fellowship*: He has a Claim to several Exemptions, Privileges, and Advantages attendant upon Admission into the Fellowship. And not only the Candidate himself, if found fit, has a Personal Right; but the *Public* has also a *Right to his Service*; and that, not only as a Physician, but *as a Censor*, as an *Elect*, as an *Officer* in the Offices to which he will upon Admission become eligible. In Dr. *Letch's* Case, the Reasons for his Rejection being called for, the Answer was, "that they judged him to be *unfit*:" And as the Legislature have vested the Judgment in the *Comitia majora*; and there was no Pretence or Ground to pretend that they had acted corruptly arbitrarily or capriciously; that Answer was esteemed a sufficient One. And they have Power, not only by their Charter, but by the Law of the Land, to make fit and reasonable By-Laws; subject to certain Qualifications.

It appears from the Charter and the Act of Parliament, that the Charter had an Idea of Persons who might practise Physic in *London*, and yet *not* be Fellows of the College. The President was to overlook *not only* the College, but also "*omnes Homines ejusdem Facultatis*." So, when then the College or Corporation

tion were to make By-Laws, these By-Laws were to relate *not only* to the Fellows, but to *all others* practising Physic within *London* or seven Miles of it. The Restraint from practising Physic is thus expressed—" *Nisi AD HOC admissus sit* by Letters testimonial under their Common Seal." Now, what does this "*ad hoc*" mean? It must mean "*ad exercendum Facultatem Medicinæ*," *admissus sit*. And this is agreeable to the Words used in 3 H. 8. c. 11. concerning Admissions by the Bishop of *London* and Dean of *St. Paul's*. The Supervisal of the Censors is expressed to include not only the Physicians of *London*, but *omnes etiam qui per septem Milliaria in circuitu ejusdem Medicinam exercent*. The same Observation holds as to Punishments. This must regard those who had a Right to practise in *London* and within seven Miles of it, and were *not Fellows* of the College. These Observations convince me that the Charter had an Idea "that *some Persons might practise by Licence* under their Seal, who *were not Fellows* of the College."

Then let Us see how the USAGE was.

In 1555, they must have had a probationary Licence, before Admission into the College. Afterwards, it was to be a Probation for four Years before Admission. The College might grant such probationary Licences, with some Reason, and agreeably to their Institution. This shews that *some* Licences were granted to Persons *not* Fellows of the College. The 3 H. 8. c. 11. takes away all former Privileges; and says that no Person within *London* or seven Miles of it shall exercise as a Physician, except he be first examined approved and admitted by the Bishop of *London* or by the Dean of *St. Paul's*, calling to them four Doctors of Physic: And the Charter and Statute confirming it have left every Thing at large to the College, no Way confined or restrained but by the *Fitness* of the Objects. In 1561, a *partial* Licence was granted to an Occulist: A Person may be fit to practise in *one* Branch, who is *not* fit to practise in *another*. Licences have also been granted to *Women*: And that may not be unreasonable in particular Cases; as, for Instance, such as Mrs. *Stevens's* Medicine for the Stone. *Partial* Licences have been given, for above 200 Years. Of late Years, indeed, *General* Licences have been usual: And the Persons applying for them have been examined, though not meant to be *Members* of the Corporation or College. In 1581, Notice is taken of *three Classes*; Fellows, Candidates, and Licentiates: And from that Time, they have given Licences to practise. The Licences probably took their Rise from that illegal By-Law (now at an End) which restrained the Number of Fellows to twenty. This was arbitrary and unjustifiable: They were obliged to admit All such as came within the Terms of their Charter. Yet it is probable that the Practice of licensing

was in Consequence of their having made it. However, for above a hundred Years, there has been a *known Distinction* between *Fellows* and *Licentiates*: It is as well known as the Distinction between Graduates and Under-Graduates in the Universities.

This being premised, let Us inquire "Who these Gentlemen are, that are now applying to the Court."

They are Persons who set up a Title directly contrary to the *Sense* in which their Licence is given to them and received by them. They can't avail themselves of their Instrument, in *this* Way: It would be a *Cheat* upon the College. And they have acquiesced many Years under this Licence given them by the College, as merely a Licence to *practise*.

But even supposing them to have a RIGHT to be Fellows; yet, as it is clear that the Licence does *not* make them *ipso facto* Fellows, they could not VOTE in the *Election* of Censors *before* their ADMISSION to the Fellowship. And therefore the Exclusion of their Votes can not impeach this Election.

I am of Opinion "that this Rule ought to be discharged."

If my Brothers should concur with me, the College as now constituted is at present to be considered as the Body Corporate. I have a great Respect for this learned Body: And, if they should think proper to hearken to my Advice, I would wish them to consider whether this may not be a proper Opportunity for them to *review* their Statutes. And I would recommend it to them to take the best Advice in doing it; and to attend to the Design and Intention of the Crown and Parliament in their Institution. I see a Source of great Dispute and Litigation in them as they now stand: There has not, as it should seem, been due Consideration had of the Charter, or legal Advice taken, in forming them.

The Statute of 14 & 15 H. 8. c. 5. after reciting the Charter, mentions it to be expedient and necessary to provide "that no Person of the said Politic Body and Commonalty aforesaid be suffered to exercise and practise Physic, but only those Persons that be profound, sad, and discreet, groundedly learned, and deeply studied in Physic."

I do not say, that *no* Man can be a Licentiate, who is not perfectly and completely qualified to be a *Fellow* of the College. Many Persons of no great Skill or Eminence have been licenced: And there seem to be fewer Checks, Guards and Restrictions upon

upon granting Licences, than upon the Choice of Fellows. Yet it has been said, "that there are Many amongst the Licentiates, who would do Honour to the College, or any Society of which " they should be Members, by their Skill and Learning as well " as other valuable and amiable Qualities; and that the College themselves, as well as every Body else, are sensible that " this is in fact true and undeniable." If this be so, how can any By-Laws which *exclude the Possibility* of admitting *such* Persons into the College stand with the TRUST *reposed in them*, "of " admitting ALL *that are fit*?" If their By-Laws interfere with their exercising their own Judgment, or prevent them from receiving into their Body Persons known or thought by them to be really fit and qualified; such By-Laws require Regulation. Such of them, indeed, as only require a proper Education, and a sufficient Degree of Skill and Qualification, may be still retained: There can be no Objection to Cautions of this Sort; and the rather, if it be true "that there are some amongst the Licentiates, unfit to be received into any Society." It is a Breach of Trust in the College, to licence Persons altogether unfit.

I do not choose to speak more *particularly*: But I recommend it to those who are now likely to be established the Masters of the College, to take good Advice upon the Points I have been hinting to them.

Mr. Justice YATES observed, that upon this Application of the Licentiates, grounded upon their not being admitted to vote, it was incumbent upon them to shew "that they had a RIGHT to vote."

They claim to be MEMBERS of the Corporation, equally with the Fellows of the College: They insist "that the Charter has " made them so." And it has been said "that there is no other " Way of continuing the Corporation;" and "that no By-Laws " or Usage can contravene the *express Words of the Charter*."

But I am far from thinking that ALL the Men of and in London then practising Physic were incorporated by the Charter. The immediate Grantees under the Charter were the *six* Persons particularly named in it: The Rest were to be *admitted by them*. They were not *ipso facto* made Members. They were *first* to give their Consent, before they became Members: They could not be incorporated *without their Consent*.

Much less are *future* Practisers of Physic of and in London actually incorporated by this Charter.

If

If the *Inhabitants of a Town* are incorporated, yet *every One* must be *admitted* before he becomes a *Corporator*. The Crown *can't oblige* a Man to be a *Corporator*, without his Consent: He shall not be subjected to the *Inconveniencies* of it, without *accepting* it and *assenting* to it. Upon moving for an Information in Nature of *Quo Warranto* against a *Corporator*, it is necessary to prove "that the *Corporator has accepted*."

The Counsel for the *Licentiates* insist, that their Admission, by the Letters Testimonial, "to practise *Physic* in *London* and "within seven Miles of it," is an Admission *into the College* or *Corporate Body*.

But this Licence "to practise *Physic* in *London* and within "seven Miles of it," does by no means render the *Licentiate* liable to all the *Burdens and Inconveniences* of being an *actual Member* of the College.

A Man is not capable of being admitted into the College, without being possessed of certain *Qualifications* which are made requisite. But granting that he really is possessed of those requisite *Qualifications*, yet his *merely being qualified* for becoming a Member does not *make* him One. The Instrument which gives the Licence or Permission "to practise," does not mention any such Thing as an Admission to be a Member of the College. The Word "*admissus*" is only used, in this Instrument, as a more classical Term than "*permisus*:" It don't import an actual Admission *into the College*. The Charter and the Act of Parliament confirming it make a Distinction between the College or Corporation, and *other Men* of the same Faculty: "To govern the "said Fellowship and Commonalty, and all Men of the said "Faculty;" and again, "*Collegium sine Communitatem prædict' et omnes Homines ejusdem Facultatis*."

A good Deal has been said about *long Usage*. But *Usage* only applies, where the *Construction is doubtful*. Here, the *Construction is not doubtful*. If it were, then indeed *Usage* for 200 Years might have Weight. But that is not the present Case.

The *taking Money* of the *Licentiates* has been urged as an Argument on their Side. But taking their Money does not prove them to be *Members* of the College. If it has been wrongfully taken from them, they may recover it back again. It has been called a *Taxing* them to be contributory to the Corporate Charges and Expences: And such a *Tax*, it has been said, can't be levied upon *Strangers*. From whence it has been inferred,

ferred, that the College did not consider them as Strangers, but as Fellows. But this can't amount to a Proof of their having been *admitted* into the College; even though it should be granted to afford them a *Claim to Admittance*: It could not give them a Right to *vote*, as being Members of the Corporation, at the Election of Censors. The present Application is not for a *Mandamus* to *admit* them; but is grounded upon the Denial of their Right to *vote*, as being Members: It supposes them to have been already admitted.

I am clearly of Opinion, that the Gentlemen now applying for this Information are NOT MEMBERS of the College.

Mr. Justice ASTON agreed, that the *Restraining the Number* of Fellows to Twenty was *illegal*: And He thought that the Distinction between Fellows and Licentiates had taken its Rise from the Restriction of the Number of Fellows.

He agreed also, that no Person can be obliged to be a *Member of a Corporation* without his *Consent*: And he allowed, that the Charter included only such Persons as *accepted* and *assented* to it.

But, after expressing a very high Opinion of Lord MANSFIELD's Abilities and Mr. Justice YATES's, and a modest Diffidence of his own, he acknowledged that his Sentiments upon the Construction of the Charter connected with the Act of Parliament, and the Right of Admission into the College, differed from theirs: And He thought that in Grants of this Kind, the Construction ought to be made in a *liberal* Manner; and this Grant includes "*Omnes Homines ejusdem Facultatis de et in Civitate prædictâ*;" and the Application to Parliament for the Act of 14 & 15 H. 8. c. 5. (intituled "*The Privileges and Authority of Physicians in London*,") to confirm the Charter, is made by the Six Persons particularly named in it, "*and all other Men of the same Faculty* within the City of *London* and seven Miles about." All the Acts of Parliament made in *pari materia* should be taken, He said, together: And the Construction has been uniform, till the Time of Queen Mary. Till then, there was no Distinction of Major and Minor, amongst these Physicians. It seemed to Him that the Idea was, "that All Persons duly qualified, who took Testimonials under the College-Seal, were to be of the Community." And this was sufficient to continue the Succession, and perpetuate it.

He should however give no Opinion, He said, how it might turn out upon a *Mandamus*.

As to the Motion *now* depending—He proceeded and concluded thus—But upon the Foot of the *present* Application for an INFORMATION in Nature of a *Quo Warranto* against the Censors, to shew by what Authority they exercise their Office; only because they have been elected *without their Intervention*, who have NEVER BEEN ADMITTED *into the Corporation*, (whatever *Claim* they may have to *demand* such Admission;) I am clearly of Opinion that they have laid no sufficient Ground to support it; and therefore that THIS Rule ought to be *discharged*.

Mr. Justice WILLES confined Himself to the Point directly and immediately in question before the Court.

These Gentlemen, the Licentiates, can have no Pretence, under the Circumstances in which they *now* stand, to object to the Election of the Censors, for Want of the Admission of *their Votes*. For, *whatever Right* they may *claim*, or whatever Right they may really *have*, to their *Admission* into the Fellowship of the College or Corporation; yet, as they NEVER HAVE BEEN *admitted* into it, no mere RIGHT of *Admission* (be it ever so clear and indisputable) can give them a Right to VOTE in Corporate-Elections, *before* they shall have been *admitted* into the Corporation.

Therefore they can not, *before* their Admission, maintain this Rule.

Lord MANSFIELD—I rest my Opinion upon *this* Ground; “that their present Application to the Court is under an Instrument which shews that they are not *now* Fellows of the College, nor *admitted* into the Corporation.”

I think that every Person of proper Education, requisite Learning and Skill, and possessed of all other due Qualifications, is *intitled* to have a *Licence*: And I think that he ought, if he desires it, to be *admitted into the College*. But I can not lay it down, “that every Man who has a Licence from the College, by Letters Testimonial, to practise Physic in *London* and within seven Miles of it, does thereby *actually become a Member* of the College, and obtain a Right to *vote in Corporate Elections*.”

The *Distinction* between *Fellows* and *Licentiates* has been established above a hundred Years: And these Gentlemen *have* ACCEPTED *an Instrument* which was NOT *understood*, by either Side, to convey a Right to be *ipso facto* Fellows; and it is plain, that they *never* have been *actually admitted* Fellows. And I am clear, that they can have no Claim to *vote*, before Admission.

How

How it might be, upon an Application to the Court for a MANDAMUS "to oblige the College to *admit* them," is *another* Question: I give *no* Opinion at all upon *that*.

Upon the former Point, I entirely concur with the Court.

Mr. Justice YATES—I give *no* Opinion how it might be upon a *Mandamus*.

Lord MANSFIELD concluded the Whole, with observing that THAT must depend upon the particular Cases of the Persons applying for such *Mandamus*, as they might be respectively *circumstanced*.

THE COURT were unanimous in DISCHARGING the *present* Rule.

Memorandum—

On *Thursday* 17th November 1768, Sir *Fletcher Norton* and Mr. *Morton* moved the Court on behalf of Dr. *Edward Archer*; and Mr. *Walker*, on behalf of Dr. *Fothergill*; for Writs of *Mandamus*, to oblige the College to admit these two Licentiates; with an Intention to try the Question "Whether the Licentiates had a Right to be admitted "Fellows:" And that Litigation lasted till 6th *June* 1771. But they only came round to the same Point which had been already determined, as above. For these two Gentlemen had accepted Licences under the By-Law of 1737: And the Court were of Opinion "that they ought not "afterwards to desert it, and treat it as null and void; "and set up a Right of Admission under the Charter, "upon the Foundation of this very Licence which they "had *accepted under the By-Law*, upon a Supposition "that the By-Law was a bad One." So that the Return was allowed, upon *that* Objection to their Claim: And the intended Question remained unsettled.

A fuller Account of that Matter may be given hereafter: But it would be improper to anticipate it at present.

However, I may venture to mention, in this Place, that after the Court had allowed the Return,

Lord MANSFIELD renewed his former Hint, by saying—
"The College will now consider, whether they will
"trust

“ trust to a Return upon *these* By-Laws; or mend
“ them.”

I am informed “ that they have done the latter.”

Saturday 30th
April 1768.

Rex *versus* Robert Cutbush, Common-Council-Man
of Maidstone.

THIS was an Information in Nature of a *Quo Warranto*, brought against the Defendant, to shew by what Warrant he claimed to be a Common-Council-Man of *Maidstone*: Which is alledged to be an ancient Town and Corporation consisting of a Mayor Jurats and Commonalty; and that the Office of a Common-Council-Man was a public Office therein.

The Defendant, in his Plea, admits this; but goes on and shews a Charter of Incorporation dated 17th *June* 21 G. 2. by the Name of the Mayor Jurats and Commonalty of the King's Town and Parish of *Maidstone* in the County of *Kent*; ordaining that Thirteen of the Inhabitants should be chosen Jurats, and One of the Jurats Mayor; of which Thirteen Inhabitants, the Twelve others should be aiding and assisting to the Mayor; and that there should be Forty of the remaining principal Inhabitants chosen to be, and should be and be called the Common-Council of the said Town and Parish. That the said Charter directed that the Mayor Jurats and Common-Council should have Power of making By-Laws. That it places the Election of Common-Council-Men in the Mayor Jurats and COMMONALTY or the Majority of them. That the Corporation accepted this Charter: And afterwards, *viz.* on 14th *March* 1767, the then Mayor Jurats and Common-Council, in due Manner assembled for that Purpose, made a Bye-Law; which By-Law recited the said Charter and the Power thereby given them; and that the Commonalty of the said Town and Parish were very numerous, and the Admission of them to vote in the *Election of Common-Council-Men* of the said Town and Parish had been *found by Experience* to be attended with many Inconveniencies, and had from Time to Time *occasioned divers Riots and Disorders and great popular Confusion* within the said Town and Parish, and had very much disturbed and broken in upon the Peace good Order and Government of the said Town and Parish; and further recited that such Inconveniencies would be likely to be remedied, if the Right of electing of the Common-Council-Men of the said Town and Parish were to be *confined* to the Mayor Jurats and such of the *Commonalty* of the said Town and Parish who then
were

were or should be *of the Common-Council* of the said Town and Parish for the Time being, and *Sixty Others* of the said Commonalty who were or should be the *senior common Freemen* for the Time being of the said Town and Parish, *as they should stand in Order and Place of Seniority upon the Books of Admission of Freemen* of the said Town and Parish; such Sixty not being either Mayor Jurats or of the Common-Council of the said Town and Parish. After this Recital and Preface, It is then (*for the preventing the like Inconveniences for the future, and for the avoiding of popular Confusion and Disorder in the Election of Common-Council-Men within and for the said Town and Parish,*) ORDAINED that upon every or any future Election of a Common-Council-Man or Common-Council-Men of the said Town and Parish, the Mayor Jurats and *such of the Commonalty* of the said Town and Parish who then were or should be *of the Common-Council* of the said Town and Parish for the Time being, and *SIXTY Others* of the said Commonalty who then were or should be the *SENIOR common Freemen* for the Time being of the said Town and Parish, *as they should from Time to Time stand in Order and Place of Seniority upon the Books of Admission of Freemen* of the said Town and Parish, (such Sixty not being either Mayor Jurats or of the Common-Council of the said Town and Parish,) or the major Part of such Mayor Jurats *Common-Council and Sixty Senior* common Freemen for the Time being of the said Town and Parish, should meet and assemble &c; and being so met and assembled should, *by Themselves*, WITHOUT the PRESENCE or CONCURRENCE of ANY OTHER of the *Commonalty* of the said Town and Parish, elect and choose One or more of the principal Inhabitants of the said Town and Parish to be a Common-Council-Man or Common Council-Men of the said Town and Parish. They aver that the said By-Law, from the Time of the making thereof, had been and still is in full Force and Virtue, and in no wise annulled revoked or repealed. The Defendant then shews that He was elected a Common Council-Man *pursuant to this By-Law*: And by that Warrant He has ever since exercised and still claims to exercise the said Office.

The King's Coroner and Attorney, in his Replication, prays Oyer of these Letters Patent of 21 G. 2. which being read and heard, He demurs (generally) to the Defendant's Plea: And the Defendant joins in Demurrer.

This Demurrer was argued on *Wednesday 27th of January* last, by Mr. Cox for the Prosecutor, and Mr. *Asburst* for the Defendant; and again now, by Mr. *Morton* for the Prosecutor, and Mr. Serjeant *Leigh* for the Defendant.

It would be tedious, to repeat their Arguments at large, after having so very fully reported (in my Third Volume, p. 1827 to PART IV, VOL. IV. 4 C 1841,)

1841,) the Case of *The King* against *Spencer*, who claimed to be a Common-Council-Man of this same Corporation, under a By-Law made with the same View as the present, of excluding the most Part of the Commonalty from voting at the Elections of Common-Council-Men, by *superadding a Qualification*, which was neither required by the Charter nor connected with the Corporate Character of the Electors.

That By-Law, which was made on 18th *August* 1764, was holden to be a *bad* One. Whereupon, the Mayor Jurats and Common-Council, still pursuing their Scheme of excluding the greatest Part of the Commonalty from voting at the Elections of Common-Council; and hoping to evade the Objections taken to their former *bad* By-Law; made this *new* One, dated 14th *March* 1767; whereby they *confined* the Commonalty's Right of Election to the *Sixty Seniors* of them, and excluded all the Rest of the Commonalty (except these Sixty Seniors) from having any Share in any future Election of Common-Council-Men.

It was now insisted, on the Part of the Prosecutor, That this also was a *bad* By-Law; a Departure from the Charter, and contrary to the Spirit and Intention of it. The Charter was obtained, they said, by the Freemen: And it recites "that it is a populous Town;" and professes to intend and mean "to *settle* a " certain and indubitable Method of Elections." But this By-Law *varies* that settled Method of Election. The Charter vests the Right of Election in *All* the Commonalty: And *All* the Commonalty amount to about 900. But this By-Law deprives Fourteen out of Fifteen of their Right, without their Consent.

They cited, in the Course of their Argument, 4 Co. 77. b. 78. a. 2 *Peere Williams* 209. "A Corporation has an implied Power " to make By-Laws: But where the Charter gives such Power, " it implies a Negative, that they shall not make By-Laws in " any other Cases." They also referred to the Opinion of the Court upon the former By-Law of 1764. In that Case of *Rex* versus *Spencer**, the By-Law was "that the Common-Council " should be elected by the Mayor Jurats and Common-Council " and *such* of the *resident* common Freemen as should have respectively served the several Offices of Church-Warden and Overseer of the Poor, respectively, for One whole Year; or the major Part of such Mayor Jurats Common-Council-Men and common Freemen *qualified as aforesaid*; without the Presence or Concurrence of Any of the Commonalty." And yet, that was holden to be bad.

* V. ante,
1827 to
1840.

But the present By-Law is more liable to Objection than that was: For, the Sixty Seniors of 900 must be very old, and may be necessitous, or non-resident: And if it should happen that a sufficient

sufficient Number of them can not attend, it may leave the Election to the Majority of the Mayor Jurats and Common-Council. And in Fact, upon this very Election, only Seven of the Commonalty did appear; of whom, Four came out of the Workhouse.

The Counsel on behalf of the Defendant, who were to support the By-Law, answered—That as to the Charter being made in order to settle a *certain and indubitable* Mode of Election—It is no more than Words of Course in Charters; and would have been implied, though not expressed.

As to the By-Law being made in Restraint of the Electors, *without* their Consent—The Mayor Jurats and Common-Council have full Power, by the Charter, to make By-Laws for the Good of the Corporation. And none can be more so, than One that prevents Confusion and Disorder: Which this does, by restraining the Number of Electors.

There is no Reason to distinguish between *this* Corporation and those mentioned in 4 Co. 77. b. 78. a. All the Arguments in that Case apply to *recent* Corporations, as well as others. Confusion and Disorder occur oftener in the Election of a Common-Council-Man, than of a principal Officer.

The Common-Council have a Right to concur in their own Election: They are *not excluded*. They do not cease to be a Part of the Commonalty. And they have as much Right to it, as the Jurats have to join in the Election of Jurats.

The Right of *Electors* may be restrained by a By-Law. In the former Case, of *Rex versus Spencer*, the By-Law superadded improper Qualifications not mentioned in the Charter, nor connected with the Corporate Capacity of the Electors; and was for *that* Reason adjudged to be bad, But this By-Law only *restrains the Number of Electors*, in order to prevent Riot Disorder and Confusion: It does not exclude an integral Part of those who are to elect.

Seniority is a corporate Qualification, and the most proper One that can be annexed. It is by no means a Probability of their Poverty; but rather of the Contrary. The Mayor Jurats or Common-Council may be *non-resident*, as well as the Commonalty.

THE COURT were clear and unanimous, That this By-Law was bad. They held it to be manifestly contrary to the Intention

Intention of the Charter: (Which, Lord *Mansfield* said, had passed upon hearing all Parties, and after much Litigation.)

It is made by a Part of the Corporation, to deprive the Rest of their Right to elect, without their Consent. The Charter gives this Right to the whole Body of the Commonalty: The By-Law confines it to a narrow Compass of the Sixty Seniors only. This expressly contradicts the Charter.

Mr. Justice YATES observed, that in the Case of Corporations, 4 Co. 77. b. the By-Law which was put in Question, did not vary the Constitution. And the great Ground of that Resolution was "that it must be made by *common Assent*." But a By-Law made by a Part of the Corporation to *exclude the Rest*, without their Assent, is not good.

And He likewise agreed to what Lord *Mansfield* had before observed, That where a Corporation is by Charter, and the Common-Council is *created by the Charter*, they ought (as being the *Creature* of the Charter) to be restrained from making any By-Laws inconsistent with it, or counteracting the End Intention and Directions of it: Though it may not be unreasonable to allow a greater Latitude in making By-Laws for the Good of the Corporation, to the Common-Council of a Corporation by Prescription, where the Common-Council is by Prescription, and such *Prescription* authorizes them to make By-Laws for the Good of the Corporation.

Per CUR'. unanimously—

JUDGMENT of OUSTER.

Tuesday 3d
May 1768.

Right, on the Demise of Green, *versus* Proctor.

THIS was a Case reserved for the Opinion of the Court.

IN EJECTMENT. *Edward Green* was seised of a House in *Saint Margaret's Westminster*, a Brew-House, and the Stock belonging to it. *Proctor* agreed to purchase one-fifth of it. *Green* covenanted to assign it accordingly. Articles of Partnership were entered into: In which were several Covenants. Amongst Others, *Green* covenanted that the said Trade shall be carried on between *Green*, *Ekins*, and *Proctor*, &c; and 300*l.* allotted for the yearly Rent of the House, shall be paid by *Green*

Green. He covenants also, that *Proctor* shall reside and dwell in the House, free of all Rent, except Taxes; and shall be allowed certain Perquisites, and Household Expences, and receive 6*l.* 6*s.* weekly for his Trouble &c. And he covenanted, that if he should die, his Executor should renew the Lease to *Proctor*. It was likewise covenanted, that neither party should dispose of his Share without acquainting the Other. Then there is a Provision that *Proctor* and his Family may use the Water of *Green's* Canal. *Proctor* alone resided in the House.

At the Trial, a Verdict was found for the Plaintiff, and 1*s.* Damages; subject to the Opinion of this Court upon this

QUESTION—"Whether upon this State of the Case, the Plaintiff has a Right to recover."

This Question first came before the Court on *Friday* last, the 29th of *April*; and was then ordered to stand over to this Day.

Mr. *Asburst*, on behalf of the Plaintiff, argued, that *Green* had not excluded himself from a joint Occupation. And if the Words do not import it, the Court will not force such a Construction, as seems contrary to the Intention.

Green had either the sole legal Right, or was Joint-Tenant with *Proctor*.

Mr. *Walker*, *contra*, was stopt by Lord *Mansfield*, it being a clear Case.

LORD MANSFIELD—At the Trial, I had no Doubt upon the Construction of the Articles: And none of us have any Doubt now.

The Plaintiff can not recover *against* his own Covenant. *Green* was to be a Gentleman, in this Affair; *Ekins*, to furnish Skill and Money; *Proctor*, to contribute Labour and Attendance. The House was to be appropriated to the Use of the Trade. *Proctor* was to have the Use and Occupation of it; and be bound to reside there; and to have Coals Candles &c, and other Perquisites; and the Use of a Pond which belonged to Mr. *Green*: and if *Green* should die, his Executor was bound to renew the Lease to *Proctor*. And *Proctor* did live in the House. *Green* has no Right to recover, under all these Circumstances.

Mr. Justice YATES—Even as a Licence to inhabit, it amounts to a Lease: And it appears most plainly to be intended that he was to reside in it.

Mr. Justice ASTON and Mr. Justice WILLES were of the same Opinion.

Per CUR'. unanimously—

JUDGMENT of NONSUIT.

Davison, on the Demise of Bromley Esq, *versus* Stanley.

THIS was a Case reserved from the Assizes; upon an Ejectment, tried before Mr. Justice *Yates*.

The Short of it, so far as concerned the Point now determined, was, That *William Bromley*, Esq. being seised in Fee, in the Year 1686, demised for Ninety-nine Years, to hold from the Day of the Date. Afterwards, *William Bromley*, upon the Marriage of *Francis Bromley* with *Ann Walsb*, joined in a Settlement with his Uncle *Francis Bromley*, and reduced his former Estate in Fee to an Estate for Life. This was a voluntary Settlement, and had a Power in it: But it was not pretended that the second Lease was made according to that Power. After this, *William* (being then only Tenant for Life) in 1693, makes a new Lease for Ninety-nine Years, to the same Tenant, of the same Premises, without communicating to the Tenant the Alteration which he had made of his Estate, by reducing his Fee to a Life-Estate: And this was acquiesced in, and the Rent paid and received, for Sixty Years. In the mean Time, and before any Objection was made with regard to these Leases, *William Bromley* died, and his Effects came into the Hands of Lord *Montfort*.

The Lessor of the Plaintiff was Tenant in Tail under the Settlement; and claimed a Right to dispossess the Tenant.

The only QUESTION upon which the Court gave their Opinion, was—"Whether the *Acceptance* of the *second* Lease operated as a SURRENDER of the *former* Lease."

Mr. Serjeant *Nares*, on behalf of the Lessor of the Plaintiff, argued that the Acceptance of the second Lease operated as a *Surrender* of the first.

He observed, that the former Lease is of the same Premises and to the same Person. *William Bromley* was then Tenant in Fee.

Fee. Then he becomes Tenant for Life; and grants a Lease to the same Person for Ninety-nine Years.

The Lessee hereby allows and acknowledges the Lessor's Right to lease. *Moore* 636. *Mellows v. May*. *Cro. Eliz.* 873. S C. is in Point.

The next Question is—"Whether any Interest passed by this "second Lease."

It is not within the Power, 'tis true: But if it be not a void Lease, it will operate by Way of Surrender of the former.

At the Time of making the second Lease, *William Bromley* was only Tenant for Life: But he could pass the Interest *during his Life*.

He cited *Dyer* 140. b. pl. 43. *Whitley, Widow*, and *Gough*: Where the first Lease was adjudged to be surrendered and drowned by the Acceptance of the second.

And the *Acceptance of Rent* nil operatur. For, the Lease became void, the Moment the Tenant for Life died: And no subsequent Acceptance of Rent could make it good. *Mr. Francis Bromley* then became immediately intitled to the Possession.

Mr. Price argued for the Defendant.—

Acceptance of a second good Lease, properly executed by a Person who had Power, I agree to be a Surrender of a former. But that is *only* where the second Lease is good. *Litt. Rep.* 268. 279. *Watts v. Maydwell*. *Hutton*, 104, 105. S C. *Sir William Jones* 405. *Lloyde v. Gregory*. *Wilson, Widow*, v. *Sir Thomas Sewell* *, *Master of the Rolls*.

* V. ante, p. 1975 and 1980. and the marginal Note in 1980.

If the second Lease is not good, the first is not avoided.

Now, here, the second Lease arises out of a Power; which must be executed strictly. And here the Power arises out of this voluntary Settlement. *Chudleigh's Case*, 1 Co. 134. a. *Whitlock's Case*, 8 Co. 71. *Carter*, 20. *Keite v. Clopton*.

He cited also 1 *Ld. Raym.* 166. *Owen v. Saunders*, and Co. *Litt.* 113. to shew that it was good without Livery.

The second Lease must pass an Interest; or else it cannot be considered as a Lease.

It does not operate as an Estoppel.

Nothing passes by this second Lease. It is no Execution of the Power. The former Lease is not mentioned in the second. *Shepp. Touchstone* 269.

It ought to be a Reservation of the most Rent. But it had gone for *more* before. *Sir T. Jones* 110. *How v. Whitfield*. 1 Eq. Cases Abr. 343. *Orby v. Lady Mobun*.

It does not operate, as ingrafted into the Settlement. It therefore does not operate at all.

In the Case of *Watts v. Maydewell*, *Littleton's Rep.* 268 the second Lease was held totally void. So in *Sir William Jones* 405. *Lloyde v. Gregory*, and 2 Ro. Abr. 495. S C. the second Lease was void; and the first still continued: The second was not good within the Proviso of 13 Eliz. but was *merely void*, and was no Surrender of the former Lease. It could not operate by Way of passing an Interest.

The Acquiescence of the Lessee only operates by Way of Estoppel. Co. 352. *Definition of an Estoppel*; Litt. § 667. Co. Litt. 47. b.

If Mr. *Francis Bromley* had brought an Action for the Rent, the Lessee would have been estopped to say that the second Lease was void.

1 Inst. 45. a. It can not operate *both* by Estoppel and also by Way of passing Interest. 6 Co. 14. b. *Treport's Case*.

An Estoppel presumes the Lease to be good.

But if this first be *not* a good Lease, then the second Lease is good.

Therefore *quacunqve via datâ*, it is with the Defendant; and the Plaintiff can't recover against him.

He observed, that the Case of *Mellows v. May* in Cro. Eliz. 873. and *Moore* 636. S C. is very differently reported by those two Reporters.

Mr. Serjeant *Nares*, in his Reply, remarked, that the Settlement being a *voluntary* Settlement, Mr. *William Bromley* must, in Point of Law, be considered as a Purchaser for a valuable Consideration.

Consideration. He had *two* Species of Interest in him; an *Estate for Life*, and a *Power*: And this second Indenture of Lease was good *under his Estate for Life*, though either *voidable* or *void* under the *Power*. And here is no Recital of any *Power*. So that the former Lease was a good one: And the taking the second was a Surrender of it. 1 Leon. 147, 148. *Read* and *Nashe's Case*.

Subsequent Livery upon a Lease *à die datûs*, being intended to make the Lease good, shall not destroy it. This was lately determined in the Court of Common Pleas.

This second Lease is good to pass an Interest; and is good by Way of Surrender.

LORD MANSFIELD agreed, that the Acceptance of a second *good* Lease will operate as a Surrender of a former. But the Reason does not hold, in the Case of accepting a new *void* Lease, or One that the Lessee *can't* enjoy.

In the present Case, Mr. *William Bromley* had probably forgotten that he had altered his Estate in Fee to an Estate for Life: At least, he did not tell the Lessee, that he had so done.

The first Lease was for Ninety-nine Years from the Day of the Date: The second Lease is for Ninety-nine Years, to commence immediately; and there is not a Word said of the Settlement or Power. The Tenant made a fair Contract, *bonâ fide*, for a valuable Consideration. The second Lease was a Deceit upon him: For the Lessor had no Title to grant this new Lease. But the present Lessor of the Plaintiff says he shall lose the former Lease too; because the latter is inconsistent with the former; and he could not hold under Both.

Where the first could be of no Use, if he had had the second; and both Parties so *intended*; there is no Inconsistency in the Acceptance of a new *good* Lease being a Surrender of the former. But the accepting a new *void* Lease, which the Lessee is *not* to enjoy, could not shew an Intention to surrender the other. Therefore, the Reason why this should be an *implied* Surrender, totally fails. A void Contract for a Thing that a Man can not enjoy, can not in common Sense and Reason, imply an Agreement to give up a former Contract. And Mr. *Price* has shewn that the Law is so; and that Cases of this Nature appear to have been grounded upon solid Reason, when they are well considered*.

* V. ante,
p. 190. Sir
Tho. Sewell's
Case, accord.

I am very clear that the Acceptance of this new Lease, which did not pass an Interest according to the Contract, can not operate as a Surrender of the former. And this is sufficient: I will not enter into any other Questions about the other Parts of the Case.

The second Lease did not pass an Interest according to the Contract.

The Plaintiff has no Right to recover.

I give no Opinion whether the Acts of the Lessor have or have not made the new Lease good for the whole of the Term.

The THREE Other JUDGES were clearly of the same Opinion.

Per CUR'.

Let the POSTEA be delivered to the DEFENDANT; in Order that a NONSUIT may be ENTERED.

Wednesday,
4th May
1768.

Rex versus Inhabitants of St. Lawrence in Winchester.

See this *Case* in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 190. Page 588.

Friday 6th
May 1768.

Green and Another *versus* Farmer and Others.

THIS was a Case reserved for the Opinion of the Court, at a Trial at *Nisi prius* at Guildhall before Lord Mansfield, at the Sittings after Trinity Term 1767.

It was an Action of Trover for several Parcels of Serges and Rackers. "Not guilty" was pleaded; Issue joined; the Cause tried; and a Case stated.

It was argued first on Tuesday 17th November last, by Mr. Mansfield, for the Plaintiffs; and Mr. Wallace, for the Defendants: And the Parties desired a second Argument. In Pursuance of which Desire, It came on again on Tuesday 26th January last:

last: When, upon some Explanations of the Facts, it being thought that they were not quite completely stated, the Court desired to be further informed of the Course of *these* Dealings, as it is a Question of general Consequence. And the Counsel agreed to amend the Case: Which they afterwards did.

The CASE, when amended, stated the following Facts. It appeared in Evidence that Messieurs *Heinzleman* purchased from the Plaintiffs the Goods in question, by the Intervention of their Packer: And they were delivered to the Defendants, their Dyers, to be dyed upon their Account, *on 12th July 1766*. That, afterwards, Messieurs *Heinzleman* and the Plaintiffs agreed "that the Plaintiffs should have their Goods back again:" Who demanded them from the Defendants, offering to pay what was due *for the dying*. But the Defendants insisted upon being paid a Debt DUE *from Messieurs Heinzleman* for dying *other* Goods, *over and above* what they owed for the dying of *these* Goods. That the Occasion of Messieurs *Heinzleman's* agreeing "that the Plaintiffs should have their Goods again," was their having failed in their Circumstances. And it was proved "that after Notice of this Failure, the Defendants delivered Eleven Pieces to Messieurs *Aston* and *Hodgson*, which had been bought of them by the Packer of Messieurs *Heinzleman*, on their Account, and sent in like Manner, to the Defendants to be dyed on their Account; *without* insisting upon being paid more than what was due for dying these Eleven Pieces;" and "that they also delivered to the Plaintiffs Five Pieces in White, without being paid any Thing."

It was further stated, that the Goods, for the Charge of dying whereof the Defendants claim to retain the Goods now in question, had been sent in to them, dyed, and returned, at the several Times specified in their Account. And it appeared from that Account, that all the Goods, for the dying whereof the Defendants now insist upon being paid before they will part with this last Parcel of Serges and Rackers, were returned without retaining or having any other Goods: And that the Demand for dying those former Goods arose from the 1st of *January 1766* to the 10th of *June 1766*, and *before* the 12th of *July 1766*. It appeared also, that there were several Periods, during which the Defendants had no Goods in their Hands.

A Verdict was found for the Plaintiffs, for 57*l.* and 40*s.* Costs; subject to the Opinion of this Court upon the following Question—

" Whether,

“ Whether, under the Circumstances of this Case, the Defendants have a LIEN upon these Goods, for *more* than the Price of the dying.”

On *Tuesday* last, (the 3d Instant,) this amended Case was argued by Mr. *Dunning*, Solicitor-General, for the Plaintiffs; and Mr. *Eyre*, Recorder of *London*, for the Defendants.

Mr. Solicitor-General argued that the Defendants had *no* such Lien, nor any Right to retain these Goods, for more than the Price of dying them.

The Right to retain depends upon a *Contract*, either express or implied.

A Taylor loses his Right to retain, if he stipulates for a particular Price. 2 *Ro. Abr.* p. 92. Title “*Justification.*” pl. 1, & 2.

So, an Innkeeper, if he delivers the Horse. If it be brought to him again, he can't retain him for the first debt.

10 *August* 1754, *ex parte Shank et al'*, before Lord *Hardwicke* —It was held that a Ship-Builder had no specific Lien upon a Ship for Repairs, *if he parts with the Possession.* 1 *Atkyns*, p. 234.

So, the present Right to retain ended with the *Return of the Goods.*

This brings the Question to the *Nature* of the Contract between these Parties.

Here is certainly *no express* Contract, to vary the Right: Nor is there any implied one.

All former Accounts were settled to the Beginning of the Year 1766. These Dyers were employed by the Merchant to dye his Goods: And there were no other Dealings between them. From the 3d to the 10th of *January*, they had no Goods of Messieurs *Heinzleman's* in their Hands: And that was the Case at several other Times; particularly, from the 10th of *June* to 12th of *July*. Therefore they did *not trust* to this Retaining: They trusted to *Heinzleman's personal* Security. Therefore they had no Right to retain for more than the Charge of dying these particular Goods.

As to the Statutes about Set-offs, which were mentioned upon the former Argument—The fair Argument from those Statutes, is “that it was thought improper by the Legislature, to carry “the Provision further than they *have* carried it.” And it shews too, what the Law was, *before* those Acts.

As to the supposed Inconvenience to Trade, and the supposed Analogy to the Case of a Factor—It is no Inconvenience to Trade: And is not at all like the Case of a Factor. The Factor is *constantly* receiving and paying: But the Dyer may never receive any more Goods, to dye.

The whole of this Demand was completed on 10th of *June*. The Dyer had no Reason to look forwards to the Merchant's sending future Goods to be dyed. There is just as much Reason to retain the Goods to answer any *other* Debt; &c.

He cited a Case *ex parte Ockenden*, a Miller; in the Matter of *Matthews*, a Bankrupt. 1 *Atkyns*, 235.—*Matthews* was indebted to *Ockenden* in 286*l.* 7*s.* 10*d.* for grinding of Corn; and became Bankrupt. He had given the Miller two promissory Notes of 100*l.* each, which became due before the Bankruptcy. At the same time, the Miller had in his Custody a Quantity of Wheat, to grind; and a great Number of Sacks. No more was due to him for grinding the *Corn then in his Hands* than 16*l.* 5*s.* Lord *Hardwicke* held “that the Miller had no specific Lien upon “the Corn and Sacks, but only *pro tanto* as was due for grinding “the Corn then in his Hands.”

In the Case of *Demainbray* and *Metcalf* *, the Pawnee had the Jewels always in his Possession, as a Security for the Sums borrowed. But here, what Security had the Defendants from 10th *June* to 12th *July*; when they had *no* Goods of the *Heinzlemans* in their Hands? This was a *subsequent* Transaction.

In the Case of *Downam v. Matthews* †, there had been mutual Dealings for several Years, without Payment of any Money, on either Side: Which the Lord Chancellor said was a strong presumptive Argument of an *Agreement* for that Purpose.

In the Petition *ex parte Deeze* ‡, there was Evidence, that it was *usual* for Packers to lend Money to Clothiers; and the Cloths to be a Pledge, not only for the Work done in packing, but for the Loan of Money likewise ||.

Here, the Defendants rested upon the *personal* Security of Messieurs *Heinzleman*.

* Precedents in Chancery, 419 2 Vern. 691, 698. Reports in Equity 104. and Abridgment of Equity Cases, p. 324. pl. 4.

† Precedents in Chancery, 580 Vide 1 *Atkyns* 236. S. C. cited by Lord *Hardwicke*.

‡ 1 *Atkyns*, 228.

|| Vide 1 *Atkyns*, 237. S. C. cited by Lord *Hardwicke*.

Mr. *Eyre*, Recorder of *London*, argued for the Defendants, in Support of their Right to retain.

He owned, it was hard to maintain the *old* Cases about Liens; and that it was not easy to apply them to mercantile Transactions.

But the Right of Retainer has been considered (he said) with more *Liberality*, of late Years: It is now put upon the Foot of mere *Justice*.

At present, a Man may have the Benefit of it in *Trover*.

The Case mentioned in that of *Chapman v. Darby*, 2 *Vern.* 117. "That where there were mutual Dealings on Account between a Bankrupt and Another, the Other should only answer to the Bankrupt's Estate the Balance of the Account," was *before* the Act of Parliament. It was the first Extention of the Common Law, by way of *Liberality*. Lord *Cowper* had come into it sooner; considering it upon the Foot of an Account current. The Courts of Common Law did not come into it so soon.

In a Case at *Nisi Prius* at *Guildhall*, it was ruled "that the Defendant could not justify keeping the Goods, till he was repaid the Duty." It was an Action of *Trover*, *M.* 12 *G.* 1. before Lord Chief Justice *Eyre*. The Plaintiff was Captain of a Ship; and brought over some Elephants Teeth, both for his Owner and for Himself. The Owner paid the Duty for the Whole; and received the Whole. The Duty was deducted in Damages: But he could not detain the Goods for it. 1 *Stra.* 651. *Stone v. Lingwood*.

Lord MANSFIELD—Most clearly, 'tis not Law.

Mr. *Eyre* proceeded—An Attorney may now retain Papers, not only till he is paid the particular Debt, but for his *general* Balance.

The Difficulty is how to set it off in *Trover*.

Lord MANSFIELD—If it can be set off in a Court of Equity, it may be set off in an Action of *Trover*; because it is a Lien. It was certainly doubtful, before the Case of *Krutzer and Wilcocks*, "whether a Factor had a Lien and could retain for the Balance of his general Account."

Mr. Justice YATES—Wherever the Plaintiff has a *Lien*, he may retain in *Trover*, as well as in any other Action, or in a Court of Equity.

Mr. Eyre—It is as reasonable to retain, in the present Case, as in the Case of a *Factor*. A *Factor* must often be *without* Goods in his Hands, as well as the Defendants were here. There is no Reason to confine it to the Case of a *Factor*: It extends equally to *every Agent*; and consequently to a *Packer*, or a *Dyer*; and with equal Reason. For, the Goods are to be considered as a *Pledge*, from the Nature of the Dealing.

He cited the Case of *Foxcroft and Others, Assignees of Satterthwaite*, against *Devonshire and Others*, Hil. 33 G. 2. B. R. And after repeating Lord Mansfield's Reasoning in that Case, (which see *ante*, p. 936, 937.) he applied it to the present Case.

Every Article of this Debt arose, he said, under the Security of a specific *Lien*.

The Goods came into the Defendants Hands, in the Course of Trade and Dealing: And a *Lien* upon them is implied in the Nature of the Transaction. And this tends to the Advancement of Credit, and the Benefit of Commerce.

As to the Case that has been cited, of 10th August 1754, *ex parte Shank et al.* *—There the Shipwright had *departed* with his *Lien*. * 1 Atkyns, 234.

I do not put it upon the Principle of the *old Cases*; but upon the Principles which have obtained since the Case of *Krutzer v. Wilcocks* †. † 1st Feb. 1755. Vide ante, vol. 1. p. 494.

And upon these Principles, the Defendant is intitled to the *Postea*; as having a *Lien* for *more* than the Price of dying.

Mr. Solicitor-General, in Reply—The Legislature have only taken Care of particular Cases: They have left this Case as they found it.

The Defendants never had a *Lien* upon *these* Goods, for *all* the several Parts of their Demand. They had a *Lien* for Part of it, upon *other* Goods: Which *Lien* they have *parted with*.

As to the *old Cases*—It don't rest upon them alone: I mentioned a *modern One* in 1754.

As

As to the Case mentioned in that of *Chapman v. Dormer*—That was upon a *Bankruptcy*: Where one Party would otherwise *pay the Whole* of what is due from him, and *receive* only a *Part* of what is due to him.

The Case of the Jewels is very strong. And the Court of Chancery will not suffer a Mortgagee to redeem till he has paid all that is due.

Ockenden's Case and *Deeze's* are reconcilable. But if they are not, the latter Opinion must be the Authority.

The Case of *Krutzer v. Wilcocks* differs from this Case; because that was the Case of a Factor; who is not in the same Case with a Dyer, who does not proceed upon the same Ideas of future Employment. The latter can have a Right to retain, *only whilst they keep Possession*. In that Case, the Factor *remained in Possession* of the Goods: Here, the Dyers parted with the Goods upon which they had a Lien for the former Demand.

As these Goods were sent to the Dyer for a *particular* Purpose, he ought not to retain them for a *general* Purpose. The particular Purpose being served, the Right to the Goods results to the Owner.

It was ordered to stand over to this Day, *Friday 6th May*, for the Opinion of the Court.

Lord MANSFIELD now delivered the Opinion of the Court.

The Case is the same, as if the Action had been brought by Messieurs *Heinzleman*: For, the Plaintiffs stand in their Place. And so, I shall consider it.

The general Question is—"Whether the Plaintiffs in this Action should be obliged to do Justice to the Defendants, by paying what is *due* to them; before they are intitled to demand the Goods from them, and to recover their Value, in Case of Refusal."

Natural Equity says, That cross Demands should compensate each other, by deducting the less Sum from the greater; and that the *Difference* is the only Sum which can be *justly* due.

But, *positive Law*, for the sake of the Forms of Proceeding and Convenience of Trial, has said that each must sue and recover separately, in *separate Actions*.

It may give Light to this Case and the Authorities cited, if I trace the Law relative to the doing complete Justice in the *same* Suit, or turning the Defendant round to *another* Suit, which, under various Circumstances, may be of no Avail.

Where the Nature of the Employment, Transaction, or Dealings, necessarily constitutes an Account consisting of Receipts and Payments, Debts and Credits; it is certain that only the *Balance* can be the Debt: And by the proper Forms of proceeding in Courts of Law or Equity, the Balance only can be recovered.

After a Judgment, or Decree "to account," both Parties are equally Actors.

Where there were *mutual Debts unconnected*, the *Law* said they should not be set off; but each must sue. And Courts of Equity followed the same Rule, because it was the Law: For, had they done otherwise, they would have stopped the Course of Law, in all Cases where there was a mutual Demand.

The natural Sense of Mankind was first shocked at this, in the Case of *Bankrupts*: And it was provided for by 4 *Ann. c. 17. § 11.* and 5 *G. 2. c. 30. § 28**. This Clause must have, every where, the *same* Construction and Effect; whether the Question arises upon a summary Petition, or a formal Bill, or an Action at Law. There can be but One right Construction: And therefore if Courts differ, One must be wrong.

* Directing mutual Demands to be balanced.

Where there was *no* Bankruptcy, the Injustice of not setting off, (especially after the Death of either Party,) was so glaring that Parliament interposed by 2 *G. 2. c. 22.†* and 8 *G. 2. c. 24. § 5.* But the Provision does not go to *Goods* or other *specific* Things wrongfully detained: And therefore neither Courts of Law nor Equity can make the Plaintiff who sues for such Goods, pay first what is due to the Defendant; except so far as the Goods can be construed a *Pledge*; and then, the Right of the Plaintiff is only to *redeem*.

† Sect. 13. for setting off mutual Debts against each other.

The Convenience of Commerce, and natural Justice are on the Side of Liens: And therefore, of late Years, Courts lean that Way—1st. Where there is an *express Contract*; 2dly. Where it is *implied* from the Usage of Trade; or (3dly.) from the Manner of dealing between the Parties in the particular Case; (4thly.) or where the Defendant has acted as a *Factor*.

The Case *ex parte Ockenden* was well considered. Lord Hardwicke's Bias was strong on behalf of Liens: And his own Determination

mination in the Case *ex parte Deeze* had been almost in point. Yet he took Time to consider it and search for Precedents. And after Consideration, he thought he could not construe it within the Mutual-Credit Clause of the Bankrupt-Act; *unless* it could be so construed in an Action of *Trover*. (And that is certainly so.) He rested upon there being *no* Room, in that Case, to *imply* a Lien, from Usage of Trade, or from the particular Manner of Dealing.

This Case, and that *ex parte Deeze*, are well reported in the printed Books: But I will read you my Note of Both.

[Accordingly, he read his own Note of the Case.]

This was in *August* 1754; and it stood over: And on 20th *December* 1754, no Precedents being found, he determined accordingly.

And no Precedents are cited *since* the 20th *December* 1754.

Then His Lordship read his own Note *ex parte Deeze*, on the Bankruptcy of *Norton Nicholls*—"That the Assignees could not take the Goods from the Petitioner, without making satisfaction for the whole of his Debt. As to a Lien in that Case, from the Nature and Course of Dealing, the Evidence is not clear." The Opinion was "That the Petitioner should be paid his Debt, before the Goods were taken out of his Hands."

Though Lord *Hardwicke* took Notice of the Evidence of Usage, he said, it was not very clear. He thought it hard that mutual Credit should only relate to pecuniary Demands; though Goods can only be paid for in Money: And in that Case, there was an Account between the Parties; Wine on one Side, and Package on the other.

I have inquired into the Case *ex parte Deeze*, and the Affidavit of the Book-keeper: [Which he particularly stated.] If the Usage there stated be true, the Packer was in the Nature of a *Factor*; and, *as such*, had a Lien for the general Balance. It was settled, in 1755, "that a Packer, being in the Nature of a Factor, would be intitled to a Lien."

Apply this to the Case *ex parte Ockenden*, and to the present Case. In this Case, the Defendant acts in *no* respect as a *Factor*; but merely as a *Manufacturer*, to dye. There is *no express Contract* "to pledge;" *no Usage* of Trade; *no Argument* from their *particular Dealing*: On the contrary, it appears that he trusted to Messieurs *Heinzleman's* *personal Credit* only. The Defendants

never

never detained any Goods to answer their Debt; but, from the 1st of *January* to 10th of *June*, gave all back: For the dying of which, they now claim to detain; without having any new Cloths sent in. After Notice of the Failure of *Heinzleman*, they delivered Eleven Pieces to *Aston* and *Hodgson*, without a Claim.

It is sufficient, that *no Contract* can be *implied*, to give a Lien for the Balance, from any Usage of Trade or Manner of Dealing: But it is much stronger, when the *Manner of Dealing* shews the contrary, and that the Defendants relied on *personal Credit* ONLY.

Therefore we are All of Opinion “that there is no *Lien* here, “beyond that which is given by the general Rule of Law: “Which never was disputed.”

POSTEA to be delivered to the PLAINTIFF.

N. B. The Price of dying was deducted at the Time of taking the Verdict; the Value of the Goods in *White* being only thereby given to the Plaintiffs.

Perkins et Al'. ex dimitt' Vowle et Al'. *versus* Sewell
et Al'. Tuesday 10th
May 1768.

UPON a special Verdict in Ejectment from *Chester*.

As to Part of the Premises—The Jury found, (amongst other Things) that *William Dexter*, being seised in Fee, enfeoffed *Henry Earl of Derby*, afterwards King *H. 4.* and his Heirs for ever. That *H. 4.* when King, by Letters Patent under the Seal of the Duchy of *Lancaster*, (reciting that *Margaret* the Granddaughter and Heir of *William Dexter* had represented “that “*Dexter* was dead, and that the Manor remained in the Hands “of the Crown,” and expressing “that the King was willing “to do that which Law and Equity, good Faith and good Conscience required,”) granted the Manor to one *Mitton* and the said *Margaret* his Wife; To hold to the said *Mitton* and *Margaret* his Wife and the Heirs of the said *Margaret*, of the Duchy of *Lancaster*; and if the said *Margaret* should die without Heirs, then to revert to the King and his Heirs.

Then the Special Verdict deduces a long Title: But it is not material to specify the Particulars; as the only Question was—
“Whether

“ Whether this Grant was within the Protection of the Act of
 “ 34 & 35 H. 8. c. 20.”

It was twice very elaborately argued. But it may be sufficient to report, That the Court was of Opinion “ That the Grant
 “ was neither a *Gift* nor a *Reward* for Services; but made as an
 “ *Act of Justice*, in Execution of some secret Trust or Confidence; and therefore *not* within either the Preamble, or the
 “ enacting Clauses of that Statute.”

And JUDGMENT was given for the PLAINTIFF.

Wednesday,
 11th May
 1768.

Goodtitle, on the Demise of Alexander and Others,
versus Clayton and Others.

SIR *Fletcher Norton*, on behalf of the Plaintiff, shewed Cause against granting a new Trial, in an Ejectment-Cause, wherein a Special Jury had given a Verdict for the Plaintiff, the Heir at Law of the Testator; and the Defendants had moved to set it aside.

The QUESTION was on the Execution of a Will. The Testator's Name was *Weston*.

Mr. Justice *Willes* read the Report of Mr. Baron *Smythe* who tried the Cause: Which was very particular and circumstantial; importing, in general, that the Evidence was contradictory; but that he could not declare himself to be dissatisfied with the Verdict, as there was Evidence on both Sides.

[If the *particular* Report can be procured within convenient Time, it shall be inserted; and the Page of its Insertion shall be referred to in the Table, under Title “ Will,” in the Article concerning Attesting Witnesses.]

Lord MANSFIELD thought it a very strong Case for a new Trial. He said, It's being an *Ejectment*-Case is no Reason at all against granting a new Trial: For, though a new Ejectment may be brought, yet here will be a Change of Possession; by which the Defendant will be a sufferer. This Objection against granting a new Trial, “ *because* a new Ejectment may be “ brought,” has been over-ruled again and again. An attesting Witness to a Will has here come to swear against her own Attestation.

Upon the Whole of the Evidence reported, it is a clear Case for Re-Consideration.

Mr. Justice YATES—New Trials are often granted in Ejectment-Cases as well as in others; where the Party praying a new Trial would suffer by a Change of Possession.

In the present Case, I think, the Witnesses ought not to have been admitted to give Evidence against their own Attestation.

There are Cases where *One* Witness has supported a Will, by swearing that the other Two attested; though those other Two have denied it.

Mr. Justice ASTON was of the same Opinion.—Every one of these Witnesses has acknowledged their having attested this Will. I think clearly that it requires a Re-Consideration.

Mr. Justice WILLES concurred; and thought the Weight of the Evidence appeared to be on the Side of the Defendants.

Lord MANSFIELD—I have several Cases, both upon Bonds and Wills, where the Attestation of Witnesses has been supported by the Evidence of the other Witnesses, against that of the attesting Witnesses who denied their own Attestation.

It is of terrible Consequence, that Witnesses to Wills should be tampered with, to deny their own Attestation.

Therefore—Let the Rule be made absolute, for setting aside this Verdict; and a new Trial be had: But it must be upon Payment of Costs.

RULE accordingly.

Catherine Lowe *versus* Newsham Peers.

Saturday 14th
May 1768.

THIS was an Action of Covenant, upon a Marriage-Contract; being a Promise under the Defendant's Hand and Seal, and in his own Hand-writing, to the Effect following—"I do hereby promise Mrs. Catherine Lowe, that I will not marry with any Person besides herself: If I do, I agree to pay to the said Catherine Lowe 1000*l*, within three Months next after I shall marry any Body else. Witness my Hand Newsham Peers * and Seal &c." This Deed was executed in 1757. And in 1767, Peers married another Woman. Whereupon, this Action was brought.

* These last Words, "and Seal," were subsequent to his Name.

The Plaintiff avers, in her Declaration, "that she had remained single, and was always willing and ready to marry him, whilst he continued single: But he married *Elizabeth Gardiner*." The Breach was assigned in Non-payment of the 1000*l.* though demanded. The Defendant pleaded "*Non est factum*."

The Question turned upon the second Count only: For, it was admitted, that no sufficient Evidence was given to support the first Count.

The Cause was tried before Lord *Mansfield*. It appeared in Evidence, by Letters that were read, that there had been a long Courtship; and that this Obligation was fairly and voluntarily given by the Defendant to the Plaintiff: The Defendant pulled the stampd Paper out of his own Pocket; and wrote, signed, sealed, and executed it, in the Presence of One Witness. And a Witness who saw it executed, attested it, after the Defendant was gone. There was no Intercourse between the Plaintiff and Defendant afterwards. The Witness to prove this Deed swore that the Defendant *sealed it before* he wrote his Name "*Newsham Peers*." Evidence was called, on the other Side, to prove the contrary.

His Lordship directed the Jury to find for the Plaintiff, with Damages 1000*l.*, if they thought the Deed to be a *good* Deed. If this Direction was wrong, he gave the Defendant leave to move for a new Trial, without Costs.

Accordingly, on *Thursday 21st April* last, Mr. *Dunning*, Solicitor-General, moved for a new Trial, with Liberty also to move afterwards in Arrest of Judgment.

RULE to shew Cause.

Upon shewing Cause on *Monday* last (the 9th Instant,) a Question was proposed to be debated, "Whether the Jury could give any more or less Damages than the 1000*l.*, the specific Sum mentioned in the Deed;" as well as "Whether this Instrument is good enough in Law, to support any Action whatsoever?"

It was then agreed that both Motions, (*viz.* for a new Trial, and in Arrest of Judgment,) should come on to be argued together.

Pursuant to which Agreement, The Case was, Yesterday and To-day, argued by Sir *Fletcher Norton*, Mr. *Cust* and Mr. *Wallace*.

lace, for the Plaintiff; and by Mr. *Dunning*, Solicitor-General, and Mr. *Mansfield* for the Defendant: But the Court, in giving their Opinions upon the two Motions, entered so fully into the Grounds and Reasons upon which they founded their determination, and discussed the Objections and Cases cited so particularly; as may render the Arguments of the Counsel unnecessary to be given here at all; or at least, more than a slight Sketch of them. The general Tendency of them was shortly this.

The Motion for a new Trial was founded upon an Objection to the Direction given to the Jury, "to find the *whole Sum* of "100*l.* in Damages, in Case they should find for the Plaintiff:" The Counsel for the Defendant insisting that the Jury ought to have been left at Liberty to give a *less* Sum, if they had thought proper; the Jury being Judges of the Damages, as well in Covenant as in Assumpsit. They cited 1 *Lev.* 111. *James* against *Morgan*; where the Jury were directed to give only the Value of the Horse in Damages, upon an *Assumpsit* "to pay a "Barley-Corn a Nail, doubling it every Nail." They also cited and much relied upon Sir *Baptist Hixt's* Case, in 1 *Ro. Abr.* p. 703. Title "Trial," pl. 9. where a Finding of less was holden to be good; and the Jury are said to be Chancellors, and may give such Damages as the Case requires in Equity.

It was answered, That where a particular Sum is liquidated and fixed by the Agreement of the Parties, and the Breach of Covenant assigned in Non-payment of that Money, that fixed Sum *alone* is the Measure of the Damages.

The Motion in Arrest of Judgment was founded upon the following Reasons—That all Engagements in Restraint of Marriage are void.—That this Engagement is of that Sort—That there is no Consideration for this Contract. It is not reciprocal: Here is no Mutuality; which is essential to the Validity of a Contract.

It was answered, That this whole Transaction amounts to a mutual Promise "to marry Each Other." The Plaintiff's Acceptance of this Deed is sufficient Evidence of her making such a Promise. So that there were mutual Promises; and Both were bound to perform them. Therefore there was a Consideration for the Defendant's Promise. However, this Promise is by a *Deed*: And a Deed carries its own Consideration.

And this is not an Engagement in Restraint of Marriage *generally*: It is only a Restraint from marrying *any Body else but Each Other*. Therefore it is not like the Case of *Baker v. White*, in 2 *Vern.* 215. or that of *Woodhouse and Shepley*, in 2 *Atkyns* 535.

Lord

Lord MANSFIELD stated the Deed particularly, and the Declaration upon it. The Words are—"I do hereby promise "Mrs. Catherine Lowe that I will not marry with any Person "besides herself: If I do, I agree to pay the said Catherine Lowe "1000*l.* within Three Months &c." The Defendant was single, at the Time; and so was the Plaintiff.

The Second Count avers that the Plaintiff was ready to marry him; and that after the making the Deed, he did marry another Woman, namely, one *Elizabeth Gardiner*: Yet he, the Defendant, *did not*, when requested by the Plaintiff, *pay the 1000*l.** which he had agreed to pay; and so (though often requested;) hath *not kept the Covenant* made between them as aforesaid. So that the *Breach* is assigned in the *not paying the 1000*l.**

To this Declaration—"Non est factum" was pleaded, by the Defendant: But the Jury found "that it *was* his Deed;" and have given 1000*l.* Damages. And by Law and in Justice, he ought to *pay the 1000*l.** MONEY is the *Measure of Value*. Therefore *what else* could the Jury find but this 1000*l.* (unless they had also given *Interest* after the three Months?)

This is *not* an Action brought against him for *not marrying her*, or for his *marrying any one else*: The *Non-payment of the 1000*l.** is the *Ground* of this Action—"That he did not, when "requested, *pay the 1000*l.**"

The Money was payable upon a Contingency: And the Contingency has happened. Therefore it ought to be paid.

There is a Difference between Covenants *in general*, and Covenants *secured by a Penalty or Forfeiture*. In the latter Case, the Obligee has his Election. He may *either* bring an Action of Debt for the Penalty, and recover the *Penalty*; (after which Recovery of the Penalty, he can not resort to the Covenant; because the Penalty is to be a Satisfaction for the Whole:) Or, if he does *not* choose to go for the Penalty, he may proceed upon the *Covenant*, and recover *more or less* than the Penalty, *toties quoties*.

And upon *this Distinction* they proceed in Courts of Equity. They will *relieve against a Penalty*, upon a *Compensation*: But where the Covenant is "to pay a particular *liquidated Sum*," a Court of Equity can *not* make a *new Covenant* for a Man; nor is there any *Room* for *Compensation* or *Relief*. As in Leases containing a *Covenant against plowing up Meadow*; if the Covenant be "not to plow;" and there be a *Penalty*; a Court of Equity will

will *relieve against the Penalty*, or will even go further than that (to preserve the *Substance* of the Agreement :) But if it is worded — “to pay 5*l.* an Acre for every Acre plowed up;” there is *no Alternative, no Room for any Relief* against it; *no Compensation*; it is the *Substance* of the Agreement. Here, the specified Sum of 1000*l.* is found in Damages: It is the particular liquidated Sum fixed and agreed upon between the Parties, and is therefore the *proper Quantum* of the Damages.

The same Reason answers to the Motion for a new Trial in the present Case.

As to the Case mentioned by Mr. Mansfield, from 2 Ro. Abr. 703. *—It is impossible to support it: For, it can not be, that a Man should be *obliged to take less* than the liquidated Sum. And the Writ of Error in that Case was plainly brought by the † Defendant. Besides, the Damages could never be taken Advantage of upon a Writ of Error. How could the *Quantum* of Damages found by the Jury be the *Subject* of a Writ of Error?

* Sir Baptist Hix v. Goates.

† It was so. Vide S. C. very clearly reported, in Cro Jac. 390. Sir Baptist Hicks v. Goates.

'Tis therefore clear, that where the precise Sum is *not* the *Essence* of the Agreement, the *Quantum* of the Damages may be assessed by the Jury: But, where the *precise* Sum is *fixed and agreed upon* between the Parties, that *very* Sum is the ascertained Damage, and the Jury are *confined* to it.

This brings the Matter to the *Validity* of the Deed.

Whatever Grounds existed at *that* Time, that could avail the Defendant to avoid the Deed, should have come on *his* Part, by a proper *Plea*, if it would in reality have been a *good* Defence for him. And therefore *if any such* Ground had existed in *this* Case, as did exist in Shepley's Case ‡; or any *other* Ground *not* appearing upon the Face of the Deed; it ought to have been avoided by a proper *Plea*. Here, we are upon the Face of the Deed: The *Plea* is “*non est factum*.”

‡ 2 Atkyns 535. Woodhouse v. Shepley, et contra.

It is objected, that this is an Engagement in *Restraint of Marriage*.

It is answered, that this Construction is directly contrary to the Words and Intention of the Deed; which amounts to a mutual Agreement between these two Persons “to marry Each Other;” and that the Plaintiff's Acceptance of the Deed proves that; and that what the Jury have found, is a sufficient Reason to have it supposed that there was such a mutual Agreement “to marry Each Other:” That, however, this is, at the utmost, only a Contract

tract "that he would not marry any *other* Woman; and that if " he should marry any *other* Woman, he would pay the Plaintiff 1000 *l.* within three Months after he should so marry any " *other* Woman;" but is very far from restraining his marrying *at all*.

This is a Point of very considerable Importance.

ALL these Contracts ought to be looked upon (as Lord *Hardwicke* said in the Case of *Woodhouse v. Shepley*) with a *jealous Eye*; even supposing them clear of any direct Fraud. In *that* Case, Lord *Hardwicke* did not proceed on any Circumstances of particular actual Fraud; but on public and general Considerations: And therefore he gave no Costs.

These Engagements are liable to many Mischiefs; to many dangerous Consequences.

When Persons of different Sexes, attached to Each Other, and thus contracting to marry Each Other, do not marry immediately, there is always *some* Reason or other against it; as Disapprobation of Friends and Relations, Inequality of Circumstances, or the like. Both Sides ought to *continue free*: Otherwise, such Contracts may be greatly abused; as, by putting Women's Virtue in Danger, by too much Confidence in Men; or, by young Men living with Women without being married. Therefore these Contracts are *not* to be *extended* by Implication.

But here is not the least Ground to say "that this Man has " engaged to marry *this* Woman." Much less does any Thing appear, of *her* engaging to marry *him*.

There is a great Difference between promising to marry a *particular Person*; and promising *not* to marry *any one else*. There is no Colour for *either* of these Constructions that have been offered by the Plaintiff's Counsel.

This *is* only a Restraint upon him against marrying *any one else*, besides the Plaintiff: Not a reciprocal Engagement "to " marry Each Other;" or any thing like it.

This Penalty is set up against the Defendant, after Ten Years have passed without any Intercourse between the Plaintiff and him.

Another Reason why we should not *strain* in Favour of this Contract, is because *if* there was *really* any *mutual* Contract under

der fair and equal Circumstances, the Plaintiff will *still* be at *Liberty* to bring her *Action*: For, a *void* Bond can never stand in her Way.

Therefore I think, that what passed at the Trial was perfectly right; that the Measure of Damages was the 1000*l.* and that this was such a Contract as ought not to be carried into Execution.

The Case of *Baker* and *White** was not near so strong as the present Case. That was in Restraint of *Elizabeth Baker's* marrying again. There is a Difference between a Restraint of a *first* Marriage, and a Restraint of a *second* Marriage: The Plaintiff there was a *Widow*, when she gave the Bond. And the Transaction was, in Effect, a mere Wager, and Nothing at all unfair in it: And yet, in that Case, the Bond was decreed to be delivered up to be cancelled.

* 2 Vern. 215.
Baker et Ux.
v. White et
Al.

Mr. Justice YATES was of the same Opinion, on both Points.

In Actions of *Debt*, it is fatal to the Plaintiff, if he *mistakes* his Demand; because the Demand is not divisible. In *Covenant*, it is divisible.

This Deed was the *only Evidence* upon which Damages could be given. It is a *Covenant* "to pay a *stipulated Sum* upon a particular Event." The Event *has* happened: The Action is brought upon it. On a Writ of Inquiry, the Inquisition would have been set aside, if *less* than the Sum specified had been found.

As to Sir *Baptist Hicks's* Case, in 2 Ro. Abr. 703.—What Lord *Mansfield* has said, is an Answer to it. The Jury ought to have allowed the stipulated Sum for every Acre that was wanting. For, according to that Rate the Purchase-Money was paid, or agreed to be paid; and according to that Rate it ought to have been allowed or refunded: Part of the Money *might* have been actually paid. And on a Writ of Error, (as Lord *Mansfield* has observed,) the finding of Damages by the Jury could not come in question.

So far, I am of Opinion for the Plaintiff: For, I think the 1000*l.* is the proper *Quantum* of Damages which the Jury were bound to find.

But on the Motion in Arrest of Judgment, upon the *Invalidity of the Deed*—I am of Opinion for the Defendant.

For,

For, this Agreement *is* in *Restraint of Marriage*. It is not a Covenant "to marry the Plaintiff;" but NOT *to marry any One ELSE*:" And yet she was under no Obligation to marry him. So that it restrained him from marrying *at all*, in case she had chosen not to permit him to marry *her*.

An Action of Covenant must be founded on the Covenant; and the Breach assigned within the Words of it.

Now *if* she had requested him to marry her, and been refused by him; how must she have assigned the Breach?—Why—"That he being requested by her to marry her, he had refused *to do so*."

But what Obligation was he under, "to marry her?" Or where was the Breach of his Covenant? This Covenant says no such Thing, as "that he would marry *her*." Tender and Refusal must apply to the Thing stipulated: But he has not stipulated "that he *would* marry her."

As to Mutuality of Contract—The Deed does not import that she shall marry him: Neither doth her Acceptance of it import any such Thing. It does not follow from her Acceptance of the Deed, that she either understood he meant to bind himself to marry her; or that she engaged to marry him.

Possibly, he might not at all mean to marry *her*, though he bound himself not to marry any one *else*. They are two quite different Things: One does not follow from the Other.

This Covenant is illegal, and will support no Action: And therefore the Plaintiff ought to *recover Nothing* upon it.

Mr. Justice ASTON concurred, upon both Points.

As to the *Quantum* of Damages—That is expressly stipulated and agreed. He took notice of what is said in the Case of *Sir Richard Edgcomb, K. B. v Rowland Dee, Vaughan*, 101. and applied it to the present Case.

As to the great Point—He said, He *had had* Doubt: But *now* he clearly concurred.

If this had been a Covenant "to marry *her*," all the Consequences which have been mentioned would have followed.

But it is *not* a Covenant "to marry *her*." The *Words* import no such Thing: And the Court *can not suppose* Fraud. It is only a Covenant to *pay* a Sum of Money, *in Case* he shall marry any one *else*, "any Person *besides* herself."

This is in *Restraint of Marriage*, and is *illegal* and *void*.

The Case of *Baker v. White* * was a Bond given by a *Widow*, * 2 Vernon conditioned to pay the Defendant *White* 100*l.* if she should after-^{215.} wards marry *again*: And *White*, at the same Time, gave her a like Bond, conditioned to pay the like Sum to her Executors, if she should not marry again before she died. She married again, to *Baker*: And he and she brought their Bill, to have her Bond delivered up. And the Bond was decreed to be delivered up, to be cancelled. He observed, that there is a Difference between a *first* and a *second* Marriage. The Restraint of a *first* Marriage is contrary to the general Policy of the Law, the Public Good, and the Interests of Society: But the frequent Customs of Copyholds intimate that the Restraint of a *second* is not so. Yet there the bond was decreed to be delivered up.

We *can not make* a Covenant for the Man: And he himself has only covenanted "not to marry any *other* Person, besides the Plaintiff."

Mr. Justice WILLES also concurred.

1st. No new Trial ought to be had. The Direction of my Lord Chief Justice was right. For, here the Deed itself *liquidated the certain* Sum: It was *ascertained* and *fixed*, between the Parties themselves; and was therefore the true and proper *Quantum* of the Damages.

2d. As to the Motion in Arrest of Judgment—I should not think it a proper Motion, if this was a Covenant "to marry *HER*." But this is only, "not to marry *Another*."

The *Words* are plain and manifest: And the *Intention* seems to have been *agreeable to them*. The Deed was executed in 1757: And the Defendant did not marry till 1767. The Plaintiff lay by, and never made a Requisition to him "to marry *her*:" But when he married Another, she brought her Action of Covenant.

It seems to me, to have been understood between the Parties themselves, and even by the Plaintiff herself, in the same Sense as we understand it now.

If so, 'tis a *Restraint upon Matrimony*, and is *illegal*, and *stronger* than the Case of *Woodhouse v. Shepley*.

Lord MANSFIELD—

Let the RULE for a NEW TRIAL be DISCHARGED: But the JUDGMENT must be ARRESTED.

This Rule (mentioned *ante*, p. 2226.) was drawn up, for the Plaintiff to shew Cause why the Verdict should not be set aside, and a new Trial had between the Parties: And in case the Court, upon hearing Counsel on both Sides, should be of Opinion to discharge the Rule, that then the Defendant should be at Liberty to move in Arrest of Judgment.

MEMORANDUM—This Judgment was affirmed in the Exchequer-Chamber, on 26th May 1770.

The End of *Easter* Term 1768, 8 G. 3.

Trinity Term

8 Geo. 3. B. R. 1768.

Alderson and Others, Assignees, *versus* Temple.

Friday 10th
June 1768.

THIS was an Action of *Trover* brought by the Plaintiffs as Assignees of *Charles La Roche* and *Robert Willing*, Bankrupts, against the Defendant.

The first Count of the Declaration sets forth, that the Plaintiffs, as Assignees, on 7th Nov. 1766, were possessed of a promissory Note drawn by *Bryer* and *Everard* for 600*l.* payable to *La Roche* and *Willing* or Order, before they became Bankrupts: which Note was accidentally lost, and came to the Hands of the Defendant; and he converted it to his own Use. The second Count was for another Note, made by one *Rachael Phipps*, to one *Richard Blackburn* for 439*l.* and indorsed to the said Bankrupts in like Manner.

To which Declaration, the Defendant pleaded “not guilty:” And thereupon Issue was joined.

The Cause came on to be tried at *Guildhall*, at the Sitting after last *Hilary* Term, before Lord *Mansfield*; when the Jury found for the Plaintiffs upon the first Count, subject to the Opinion of the Court upon the following Case; and for the Defendant, upon the second Count.

CASE. The Bankrupts *La Roche* and *Willing*, on *Friday* 7th Nov. 1766, indorsed the Note in question to the Defendant *Temple*, to whom they were indebted to a large Amount; and sent it in a Letter directed to him at *Trowbridge*; which Letter was carried to the Post-House *that Morning*; the Bankrupts thinking *that* the Post-Day for *Trowbridge*. The Letter, by the Course of the Post (which went out on the *Saturday Night*) was received

received by the Defendant some Time on *Monday* the 10th; and could not be so before.

The Note in question was—" *London, 10th Octob. 1766.*
 " Two Months after Date, We promise to pay Messieurs *La*
 " *Roche and Willing*, or Order, Six hundred Pounds, for Value
 " received. *Bryer and Everard.*"

The Bankrupts had given *Bryer* and *Everard* Two Notes for 300*l.* each; which had not been discharged. *La Roche* and *Willing* committed Acts of Bankruptcy on *Saturday* the 8th. And the said Note was so indorsed, and sent to the Defendant in Contemplation of their Insolvency and subsequent Failure.

The Question for the Opinion of the Court was—" Whether
 " the Plaintiffs ought to recover." If not, they were to be nonsuited.

This Case was argued by Mr. *Chambers*, for the Plaintiffs; and Mr. Solicitor-General, for the Defendant.

Two Questions were raised upon it. First—" Whether the
 " Bankrupt's Property in the Note was *devested* before the Act
 " of Bankruptcy was committed by him:" Second—" Whether
 " a Trader can, in *any* Case, give such a *Preference* as this."

Mr. *Chambers* insisted that the Property of the Bankrupts in this Note was *not* *devested*. He urged, that mutual Consent is necessary to all Contracts: Whereas here was none on the Part of the Defendant. If this Note had been lost, it would have been the Risk of the Owner: The Defendant would not have borne the Loss. He had not agreed to accept it: Possibly, he might have declined doing so. And the Bankrupts might have countermanded it. Their Bankruptcy is a Countermand and Revocation. *Vide Jenkins's 3d Century, Case 9. p. 109. Digest, Lib. 41. Title 2. Law 38.* (Master writing a Letter to a Slave; the Property in him is not *devested*, till the Letter is received.) *Lane v. Cotton et al. Carthew 487. 2 Atkyns 562. 1 Atkyns 15. 1 Atkyns 245. Snee and Baxter, Assignees of Tollet, against Prescot and Others; and the Case of Hague and Others, Assignees of Ann and Isaac Scott, against Rolleston *, H. 8 G. 3. in this Court.*

* Vide ante, p. 2174.

He insisted, secondly, that it is not in the Power of a Bankrupt to make such a Preference as this. Reason and Equity require that all the Creditors of a Bankrupt should be put upon an equal Foot: And this is the View, End, and Intention of
 the

the Bankrupt-Laws; which are to be construed liberally for Creditors.

Mr. Solicitor-General (*Dunning*) on the other Side argued, that the Property was divested. That a Disagreement shall not be presumed; but, on the contrary, an Acceptance shall be intended, unless the contrary appears: The Contract does not stand open till Agreement; but is complete, unless there be an actual Disagreement. This Letter could not have been recalled, after it was once put into the Post-Office. A Delivery to One, to the Use of Another, upon a precedent Consideration, is not counter-mandable; but vests the absolute Property in that other Person, before his Agreement to it. In Proof of all which, he cited the Case of *Atkin v. Barwick*, in Sir *John Strange's* 1st Volume, page 165. and he also mentioned the Case of *Peter Harris v. Peter De Bervoir*, in *Cro. Jac.* 68.

As to the Preference of the Defendant to the other Creditors, He said it was very just and reasonable to give it in the present Case: And there is no Authority to prove that such a Power may not be exercised by a Bankrupt, where it is just and reasonable*.

* Vide post, 14th June 1774, *Harmann and Others versus Fisher*; upon the Preference given to Mr. Fisher by *For-dyce*.

He rehearsed the Case of *Small and Oudley*; and cited *Wilson v. Day*, as a Proof that an Assignment of Part of the Effects is good, if Possession is delivered.

But THE COURT were of Opinion for the Plaintiffs, the Assignees of the Bankrupts. They held this Indorsing and Sending the Note, under the Circumstances stated, to be *fraudulent* upon all the other Creditors, and particularly Messieurs *Eryer* and *Everard*.

RULE—That the POSTEA be delivered to the PLAINTIFFS.

I was not present when the Court pronounced this Rule; being, at that Time, confined with the Gout. Therefore this is all that I can report, as from Myself. But as I am informed that Lord *Mansfield* was very copious in delivering his Opinion, and laid down several Positions which well deserve to be kept in Memory, I have, by the Favour of a very eminent Barrister and most excellent Note-Taker, procured the following Account of what his Lordship said: Which, being more accurately taken down than I should have been myself capable of taking it, had I been present, must therefore be more satisfactory to the Reader, than any Report of my own could have been.

Lord MANSFIELD—This is an Action of *Trover*, brought by the Assignees of *Laroche* and *Winning*, for a Note of 600*l*. And there is a Verdict for the Plaintiff, upon the following Case—

The Bankrupts, upon the 7th of *November* 1766, indorsed the Note in question; which is in the Words following; “*London, 10th Octob. 1766. 600*l*. Two Months after Date We promise to pay to Messieurs Laroche and Winning or Order, 600*l*. Value received;*” and is signed by *Bryer* and *Everard*. The Note is indorsed by the Bankrupts to the Defendant, to whom they were *indebted, to a larger Amount*; and was sent to Him in a Letter directed to *Trowbridge*, which was carried to the Post that Morning, and was *received* on the 10th, and could not be received before.

The Bankrupts had given *Bryer* and *Everard* two Notes for 300*l*. each; which had *not* been discharged.

Laroche and *Winning* committed several Acts of Bankruptcy on the 8th.

The Note was so indorsed and sent to the Defendant by the Bankrupts, IN CONTEMPLATION of *their Insolvency and Bankruptcy*.

UPON this Case, the QUESTION is, “If the Plaintiff ought to recover.”

And it is material to observe a great deal that is *not stated* in it. First—There *never was any Course of Dealing* between the Bankrupts and the Defendant, by way of indorsing or sending Notes to Each Other. The next Thing is, that the *Letter* in which the Note was sent, is *suppressed by the Defendant*. It is not found “that the Note was indorsed *in Payment of any Debt*.” It is only said “He was a Creditor to a larger Amount.” It is not said whether it was to be received at the *Risque of Temple*; or only as *Agent of the Bankrupts*: But the Letter, which was in the Power of the Defendant, was not produced; and so the Case stands *without any Appropriation* of the Note. The Case is silent in these Particulars; and very materially so.

It is found “that *Bryer* and *Everard* were Creditors of the Bankrupts to just the same Amount, for two other Notes they had taken in Exchange;” and “that those two Notes were *not discharged*.”

The

The only QUESTION I make is—"Whether, under the
 "Circumstances of this Case, the Indorsing and Sending this
 "Note to the Defendant is FRAUDULENT; and VOID, *as such*."

And I choose to put the Case upon *that* Ground; because the most desirable Object in *all* judicial Determinations, especially in *mercantile* ones, (which ought to be determined upon natural Justice, and not upon the Niceties of Law,) is, *to do substantial Justice*. And therefore I will avoid laying the Stress that might properly be laid upon the *Assent* being necessary to *complete* the Contract, or the *Want of a Delivery*; the solid Ground of which is, that a Contract shall be presumed complete upon any Distinction where the Justice of the Case requires it, though there is no *actual* Delivery. And it is settled "that if a Man sends Bills of
 "Exchange, or consign a Cargo; and the Person to whom he
 "sends them *has paid the Value before*; though he did not know
 "of the sending them at that Time, the sending of them to the
 "Carrier will be *sufficient to prevent the Assignees* from taking
 "these Goods back, in case of an intervening Act of Bank-
 "ruptcy:" But if Goods or Bills of Exchange are sent, and the Consideration has not been received, the Court of Chancery always interposes; and there are Numbers of adjudged Cases of that Kind, in Chancery. In the Case in **Strange*, there is no Doubt but the Honesty of the Case inclined the Court to the Judgment they gave: The *Reason given* turns upon a Subtilty. The Court of Chancery, in that Case, would have interposed, and said "the Assignees should not have the Goods without paying the Price." I think the Determination was right; and there was an actual Delivery to a Person who became a Trustee: But a Post-Boy is not a Trustee. I think the Case was well supported upon other Grounds than those mentioned in the Book.

* *Atkins v. Barwick*, v. 1. Sir J. Str. 165.

I ground my Opinion upon *this*, "Whether the Indorsement
 "be *fraudulent*." And as to *that*, it is certain that the Statutes of Bankruptcy leave a Trader, to the Moment of an Act of Bankruptcy committed, every Power an Owner can have over his Estate. The Statute says †—"Fraudulent Conveyances shall
 "be an Act of Bankruptcy." Other Acts that are fraudulent
 are not made Acts of Bankruptcy: But they are attended with the Consequences of Fraud, *at Law*; which is, "that Fraud
 "renders *every* Act void."

† V. 1 Jac. 1. c. 15. § 2.

ALL Acts to defraud Creditors or the Public Laws of the Land are *void*: And if the Nature of the Act be a *Conveyance* or *Grant*, 'tis not only void, but an *Act of Bankruptcy*. It has been determined "that a Conveyance by a Trader, of *all* his Effects, for the
 "Payment of one or more *bonâ fide* Creditors of the most merit-
 "orious

* Vide ante,
p. 477.

“ orious Kind, though his Effects do not amount to Half what
 “ is due, is *void*; because it is *not* an Act in the *ordinary Course*
 “ of *Business*; it is not such an Act as a Man could do, but it
 “ must be followed by an immediate Act of Bankruptcy, and it
 “ is defeating the *Equality* that is introduced by the Statutes of
 “ Bankruptcy, and the Criminal (for the Bankrupt is considered
 “ as a Criminal) is taking upon himself to prefer whom he
 “ pleases.” But suppose he *leaves out* a considerable Part of his
 Effects: If it appears to be *only colourable*, that don’t vary the
 Case; it is fraudulent. Suppose a Trader makes a Conveyance
 of *all* his Estate, for the Payment of all his Creditors *except one*,
 (which was the Case of * *Gayner* cited in *Demattos’s Case*,) it is
 void. Suppose it was, “ to pay *all his Creditors rateably*.” If
 there were no Assent of his Creditors, or Composition, it would
 be void: For, it would be Rescinding the whole System of the
 Bankrupt Laws, and instead of applying to the Great Seal, he
 would choose his own Trustees. If this is a *fraudulent Act*, it
 is *void*.

A general Question has been started, “ Whether in *any Case*,
 “ upon the Eve of a Bankruptcy, a Man may do that which in
 “ consequence prefers a particular Creditor:” And that has been
 argued as a *general Question*.

† Vide ante,
p. 480.

But that will depend upon the *Act*. As, If a Bankrupt, in
 Course of Payment pays a Creditor; this is a fair Advantage, in
 the Course of Trade: Or, If a Creditor threatens legal Diligence,
 and there is no Collusion; or begins to sue a Debtor; and he
 makes an Assignment of Part of his Goods; it is a fair Transac-
 tion, and what a Man might do without having any Bankruptcy
 in View. Suppose such a Case as † *Small and Oudley*: There it
 was for the Advantage of the Creditors, and no Fraud to them;
 and if Part of the Transaction were set aside as fraudulent, the
 whole must. But it never entered into the Mind of any Judge,
 to say “ that a Man, in *Contemplation* of an Act of Bankruptcy,
 “ could sit down and dispose of all his Effects to the Use of
 “ *different Creditors*.” For, that would be a Fraud upon the
 Acts of Bankruptcy. But if done in a *Course of Trade*, and *not*
fraudulent, it may be supported.

THIS WAS *not* done in a *Course of Trade*: For, there never
 was any Dealing between the Parties in sending indorfed Notes.
 There was *no Application* made by the Defendant. And it was
 done with a *View to positive Iniquity*: For, the Bankrupts had
 received this Note from *Bryer* and *Everard*, for Notes of the same
 Value; and knowing they should become Bankrupts the next
 Day, to defeat *Bryer* and *Everard* of setting off their Notes
 against it, indorse this Note to another Person. And there was
 no

no Way of doing Justice to *Bryer* and *Everard*, but supporting the Claim now made by the Assignees. So that there was express particular *Fraud*, at the Time the Fact was done. Next, 'Tis an Act that is, most certainly, *not complete*, as between the Parties. The Argument in the Case of **Scott* is very applicable to the present. For, there was a Preference given to a *bond fide* Creditor: But he knew nothing of it. Suppose, in the Course of Trade, a Bill is sent to *Constantinople*, and a Bankruptcy happens in *England* before it arrives; yet it may be good. But here, it is done, because they were resolved to commit an Act of Bankruptcy.

* Vide ante,
p. 2174.

The THREE Other JUDGES agreed that an ASSENT is necessary to *complete* every Contract; That in the present Case, the Defendant has his Election till the Tenth of *November*; That the Act of Bankruptcy being committed on the Eighth, the Contract was incomplete; and That, upon the whole Circumstances taken together, the Transaction was fraudulent and void.

Per CUR'. unanimously—

Let the POSTEA be delivered to the PLAINTIFFS.

Rex versus Smart.

Monday 13th
June 1768.

THIS was upon an Information in Nature of *Quo Warranto* to shew by what Authority the Defendant exercised the Office of an Alderman of *Malden*.

This Corporation consisted of Three integral Parts; the First of which was not a Mayor, or a *single* Bailiff, but *Two* Bailiffs. The Charter directed the Time and Manner of their Election, as may be seen *ante* p. 2130 and 2131. in the Case of *The King* against *Charles Malden*: In which Case, Judgment of Ouster was given against the said *Charles Malden*, One of the then Two Bailiffs, for Want of a proper Swearing in. The present Defendant, Mr. *Smart*, was chosen an Alderman at a Corporate Meeting where *Jonas Malden* and this *Charles Malden* who was afterwards ousted, presided as Bailiffs. He was chosen by a Majority of the collective Body, then present.

The whole Corporation, when full, consists of Two Bailiffs, Six Aldermen, and Eighteen Head-Burgesses.

The Question was—"Whether the Election of the Defendant was legal; since a Judgment of Ouster had been given against

" Charles Malden who presided at it, together with Jonas Malden, the other Bailiff."

Mr. Wallace, (on Wednesday the 11th of last Month,) argued for the Defendant. He said, that "*major Part*" means the major Part of the whole Number; and that it is not necessary that there should be a major Part of the Two Bailiffs, or that *both* Bailiffs *must necessarily be present*.

The Election might be by a Majority of the Body present, even against the Opinion and Vote of *both* Bailiffs and all the Six Aldermen. A major Part of the *collective* Bodies are enough to do the Act.

It will be objected, " That there being *only One* good Bailiff, no Business could be done."

But it is not necessary that either of the Three integral Parts of the Corporation should be full: For, the Consequence would be, that if the Office of any One Bailiff or even any One Head-Burges was vacant, or the Person absent, there could be no Election at all.

Mr. Ashurst, *contra*, for the Prosecutor.

The Head-Office must be *full*. It is an *integral* Part, and here consists of *Two* Bailiffs: They *Two* make but *One Officer*. It is only *One Office*: And, to do a Corporate-Act, both must be *present and concur*.

In the City of London—" When One Sheriff dies, the Other can not act. He is no Sheriff: He must wait till Another be made." 1 Show 289. Jones v. Bean, (or Beau. Vide 4 Mod. 16. S. C.)

In a Corporation aggregate consisting of Two Bailiffs and a certain Number of Burgeses, the Bailiffs are an integral Part of the Corporation; and they Both make but One Officer: The One can not act without the Other. Mod. Cases in Law and Equity (8 Mod.) 303, Salter v. Grosvenor.

* The Words are, "that the Bailiffs and Head-Burgeses or the major Part of them for the Time being," should elect the new Alderman.

The Words of the Charter make it necessary that Both Bailiffs shall be present *.

If the *Two* Bailiffs are present, it is a good Corporate Assembly: And in *such* Case, I agree that an Election by a Majority of the *whole* Body assembled is good. But here was only *One* of the Persons

Persons who constitute the Head-Officer present, instead of *Two*:
Therefore the Election was not good.

Mr. *Wallace*, in Reply—It might be as well said, “That All
“ the Aldermen must be present.” The Bailiffs do not here ap-
pear as Head-Officers, as in a *Corporate Assembly*: This is only a
Special Power lodged in the Two Bailiffs, Six Aldermen, and
Eighteen Head-Burgessees.

If Two Bailiffs are necessary to meet for Election of an Alder-
man, the Corporation is *dissolved*. The Presence of some *Part* of
every integral Part is indeed necessary to make good an Election:
But it is not necessary that *all* should be present.

N. B. Upon this Argument, It seemed to be agreed by
the Court and Bar, that there would have been no Diffi-
culty, if the Corporation had been “*Mayor Aldermen*
“ and Head-Burgessees,” instead of *Bailiffs Aldermen* and
Head-Burgessees.

ULTERIUS CONSILIUM.

On *Saturday* last, It was argued a second Time, by Mr.
Solicitor-General for the Defendant, and Mr. *Morton*, for the
Prosecutor; and was then ordered to stand over to this Day, for
the Opinion of the Court.

And now,

Lord MANSFIELD shortly said—In that Case of *Malden*,
on *Saturday*, We are of Opinion “that *Two* Bailiffs are necessary
“ as presiding Officers.” If the Corporation had *chosen* but One
Bailiff, there had been no Head-Officer at all.

All our Wishes were with you, Mr. Solicitor: But we can
not possibly help you.

There is no considering them in any other Light, than if they
had been a Mayor.

There must be JUDGMENT for the CROWN.

RULE—That Judgment be entered for the King against the
Defendant.

Rex

Wednesday
15th June
1768.

Rex *versus* Mayor, Bailiffs, Burgesſes and Town-Clerk of Liverpool.

ON *Thursday* 12th *November* laſt, Mr. *Wallace* moved for a *Certiorari* to remove an Inquiſition, and a Verdict thereon taken before the Sheriff of *Lancaſhire*, by Virtue of a Private Act of Parliament, (8 *Ann. c. 25.*) intituled—“An Act to enable “the Corporation of *Liverpool* to make a Grant to Sir *Cleave Moore* Bart. for Liberty to bring freſh Water into the ſaid “Town of *Liverpool*.” Upon which ſaid Inquiſition the Jury have determined upon their Oath, that there ſhould be paid allowed and given to and amongſt the ſeveral Owners and Occu-
piers of Lands Soil and Ground in the ſaid Inquiſition particularly mentioned and deſcribed, the Sum of 176 *l. 4s. 9d.* Far-thing, in the ſeveral Proportions therein mentioned; and which ſaid Inquiſition and Verdict thereon have lately been carried into and are now kept amongſt the Records and Writings in the ſaid Town of *Liverpool*.

Mr. *Wallace* cited the *Glamorganſhire*-Caſe reported in 1 *Lord Raym.* 580. and in 12 *Mod.* 403. and *Comyns* 86. S. C. to ſhew that a *Certiorari* would lie in this Caſe.

The COURT ſaid—There can be no Doubt of that, if it is not prohibited by the Act of Parliament.

THESE PROCEEDINGS having been afterwards returned up by *Certiorari*, and a Motion made for quaſhing them;

Mr. *Dunning*, Solicitor-General, for the Proſecutor (Mr *John Jordan*, Affignee of Sir *Cleave Moore*,) ſhewed Cauſe why the Inquiſition, and the Verdict taken thereupon, and alſo the Judgment ſhould not be quaſhed.

The Objections that have been made are Three—

1ſt. It does not appear that the Lands were *neceſſary* for the Conveyance of the freſh Water through them.

2dly. The *Damages* were aſſeſſed by the *Lump*.

3dly. No proper Notice was affixed and given, as is requiſite.

In answer to the firſt Objection—It is not neceſſary that it ſhould appear. The Requiſition of Sir *Cleave Moore* or his Affigns

Assigns is sufficient to vest the Jurisdiction in the Sheriff: Nothing more is required.

2dly. The Damages are properly divided. Therefore the Objection is not true in Fact.

3dly. If the Terms are not complied with, Mr. *Jordan* can not have any Advantage from his Inquisition. The Notice don't indeed appear upon the Inquisition: Nor is it necessary that it should. The Party is to give the Notice. The Sheriff has nothing to do with the Notice; which is an anterior Act, to be done Twenty Days before the Inquisition.

Mr. *Lee, contra*—The general Objection is, “That the Act of Parliament has not been strictly and properly pursued; so as to give the Sheriff Jurisdiction to do what he has done.”

1 *Burr.* 377, *Rex v. Manning*. It must appear that the Authority has been pursued. [*Vide ante*, p. 377 to 383.]

LORD MANSFIELD thought that *Notice* ought to have been given to the Parties interested in the Lands; and, that it ought to have appeared upon the Inquisition, and also to shew that there was a *jurisdiction*.

Mr. Justice ASTON was of that Opinion.—The Sheriff was to specify the Time and Place of the Jury's Meeting; and to affix the Notice on the Church Door; and specifically, if he can, to the Party's Door whose Lands are to be affected.

Mr. Justice WILLES was of the same Opinion for the same Reason, “that the *jurisdiction ought to appear*.”—Now, *without* Notice he had no Jurisdiction. The Sheriff was to give the Notice: And he should have shewn it. We can not intend an inferior Jurisdiction, unless it be properly set out. If it had been properly set out “that Twenty Days Notice was given, pursuant to the Act,” then the Inquisition and Judgment had been conclusive against the Owners of the Lands.

Per CUR'. unanimously—

RULE made ABSOLUTE for quashing the INQUISITION,
VERDICT and JUDGMENT.

Thursday
16th June
1768.

Rex *versus* Inhabitants of East Donyland.

See this *Case* reported at large, in the Quarto-Edition of my
SETTLEMENT-CASES, N^o. 191. Page 592.

Friday 17th
June 1768.

Fen, on the several Demises of William Lowndes the
Younger, and Henry Lowndes Esqrs. *versus* William
Lowndes the Elder, and William Lowndes Stone
Esqrs.

IN EJECTMENT. At the *Lent* Assizes at *Bedford* 1768, a
Verdict was found for the Plaintiff; subject to the Opinion of
the Court on the following Case—

Thomas Layton, being seised in Fee-Simple, of and in the
Manor &c, and divers Messuages Lands &c, on 20th *May* 1723,
by his last Will and Testament in Writing duly executed, gave
and devised in the following Words—

“ *Item*—I give devise and bequeath unto my dear and loving
“ Wife (which I declare to be in Lieu and full Satisfaction of
“ any Dower that she may have or lawfully claim out of any of
“ my Messuages Lands Tenements and Hereditaments whereof
“ I shall die seised or possessed of, or otherwise intituled unto,
“ either in Law or Equity,) All those my Messuages Lands
“ Tenements and Hereditaments at *West Cotten End* in the Parish
“ of *Wilbamstead* in the County of *Bedford*, now in the Occupa-
“ tion of *James Cox* (*et alia*;) and also all the Rents and Profits
“ issuing and arising out of the Manor of *Woottenbos* in the Parish
“ of *Wootten* in the said County of *Bedford*, during the Term of
“ her natural Life. *Item*—I give bequeath and devise my afore-
“ said Manors Messuages Lands and Premises herein before
“ given and devised to my said Wife during her natural Life,
“ and after her Decease, to my Daughter *Margaret Lowndes*
“ (now the Wife of *William Lowndes junior* Esq.) for and during
“ the Term of her natural Life; and after her Decease, to my
“ Grandson *Layton Lowndes*, the second Son of my said Daugh-
“ ter *Margaret*, and to the Heirs Male of his Body; and for
“ Want of Issue Male, to the Issue Female of his Body lawfully
“ to be begotten; and for Want of such Issue, to such other Son
“ of my said Daughter *Margaret*—If my Grandson *Layton*
“ *Lowndes*

“ *Lowndes* should live and be the *Eldest*, then to such Son who
“ shall be the SECOND Son of her Body living at the Time of her
“ Decease, by the said *William Lowndes* her present Husband;
“ and if but ONE Son living at the Time of her Decease, then
“ to such only surviving Son and his Heirs for ever. And for
“ Want of Issue Male at the Time of the Decease of my said
“ Daughter by her present Husband; if more than One Daugh-
“ ter, then do I appoint that the said Estate herein before de-
“ vised shall be sold to the best Purchaser or Purchasers as can be
“ got for the same; and the Money arising by such Sale to be
“ equally divided to and amongst all and every the Daughters by
“ her present Husband, Share and Share alike, as shall be living
“ at the Time of the Decease of my said Daughter: And if but
“ One Daughter, then I devise the said Messuages Lands and
“ Premises (without any Sale) to such only Daughter and her
“ Heirs for ever. But if in case my said Daughter shall survive
“ all her said Children by her said present Husband, and the
“ Heirs of such Child or Children; then I give and devise the
“ said Manors Messuages Lands and Premises, after the De-
“ cease of my said Daughter, to my Brother *William Layton*, for
“ his natural Life: And after his Decease, I give and devise the
“ same to my Son in Law *William Lowndes*, his Heirs and
“ Assigns for ever.”

In December 1723, the Testator died, without altering or re-
voking his said Will; leaving *Elizabeth* his Widow, and the said
Margaret Lownde his only Child and Heiress at Law: And the
said *Elizabeth* his Widow entered upon the said Minor Messuages
Hereditaments and Premises so devised to her for Life as afore-
said; and continued in Possession thereof until her Death, which
happened in December 1757. Upon whose Death, the said *Mar-
garet Lowndes*, or the said Defendant *William Lowndes* the Elder,
her Husband, in her Right, entered upon the said Premises by
Virtue of the said Testator's Will.

Margaret Lowndes had Issue by the defendant *William Lowndes*
her said Husband, born in the said Testator's Life-time, the De-
fendant *William Lowndes Stone* her Eldest Son; *Layton Lowndes*,
her Second Son; *Charles Lowndes*, her Third Son; *Richard*
Lowndes, her Fourth Son; the Plaintiff *Henry Lowndes*, her Fifth
Son; and *Thomas*, born after the said Testator's Decease.

Layton, *Charles*, and *Richard Lowndes* severally departed this
Life in the Life-time of their said Mother; and the said *Layton*
and *Charles* died unmarried and without Issue: And the said *Ri-
chard Lowndes* left Issue Two Sons, the said Plaintiff *William*
Lowndes the Younger, and *Richard Lowndes*, Infants; and no
other Issue.

The

The said *Margaret Lowndes* departed this Life 2d *March* 1764; leaving the said *William Lowndes Stone* the Defendant, and the Plaintiff *Henry Lowndes* and *Thomas Lowndes* her only Sons; who, with the Plaintiff *William Lowndes* the Younger and *Richard Lowndes* (Sons of the said *Richard* deceased) were her only Male Issue her surviving.

Upon this Case, the general Question submitted to the Court is—"Whether the Plaintiff is intitled to recover, upon either, "and which of the Two Demises."

This Case was argued on *Friday* last, by Mr. *Morton* for the Plaintiff, and Mr. *Caldecott* for the Defendants.

Mr. *Morton* urged, that the Testator's Intention was, to provide for the Children of his Daughter: But he never meant that her Eldest Son should take so long as there was Issue of any of her other Sons. His View was, "That his own Estate should never "be confounded with that of his Son-in-Law *William Lowndes* "the Elder." He meant to give it to *Layton Lowndes* and his Heirs Male and Female; and for Want of such Issue, to such other Son of his said Daughter *Margaret*, as should happen to be her *second* Son at the Time of her Death.

The Words—"and for Want of such Issue, to such other Son "of my said Daughter *Margaret*"—ought to be rejected, in Favour of the Testator's Intention.

The Grandfather is living, in an advanced Age, and is desirous of having the Opinion of the Court, that he may dispose of his Estate amongst his Grandchildren accordingly.

Mr. *Caldecott* argued for the Defendant *William Lowndes Stone*, the Heir at Law; viz. Eldest Son of *Margaret*, the Testator's only Child.

He said that neither *William* the Issue of *Richard*, nor *Henry* who was the second Son at the Time of the Death of the Mother, can have any Right.

Margaret did not die seised under the Devise; but by the Event of the Right in Fee being devolved upon her as Heir at Law to her Father.

After the Devise to *Layton Lowndes* and his Heirs Male and Female, the next Words are—"And for Want of such Issue, "to such other Son of my said Daughter *Margaret*—If my "Grandson

“ Grandson *Layton Lowndes* should live and be the eldest, then
 “ to such Son who shall be the second Son of her Body living at the
 “ Time of her Decease; and if but One Son living at the Time
 “ of her Decease, then to such only surviving Son and his Heirs
 “ for ever.” So that there is no certain Description of the
 Person who is to take: And therefore it is void. *Cro. Eliz.* 742.
Taylor and his Wife v. Sayer. “ Where a Devise is uncertain, it
 “ is void.”

Or if you suppose that the Sentence is incomplete, the Devise
 is equally void. *Butler and Baker's Case*, 3 Co. 25.

Then taking it in Connexion with the Words, “ If my Grand-
 “ son *Layton Lowndes* shall live, and be the Eldest;” it is a
 Condition precedent, and never took Effect. Besides, the Devise
 is, “ then to such Son who shall be the Second Son:” Whereas
William the son of *Richard* is a Grandson, not a Son. And his
 Father could not take; because he was not alive at the Death of
 his Mother: Which was a Requisite expressed in the Devise;
 “ living at the Time of her Decease.” Nor could *Henry*, her fifth
 Son take, when there was Issue living of *Richard* her fourth Son.

He cited 2 *Peere Williams* 143. *Beaumont v. Fell*; for the Sake
 of a Case which the Master of the Rolls there mentioned, (a Case
 taken from *Swinburne* 389.) “ That where a Man intends to give
 “ a Legacy to J. S. and he gives the same to J. N. there neither
 “ J. S. nor J. N. shall take the Legacy; for as much as J. N.
 “ is not the Person intended, and J. S. is not the Person
 “ named.”

Mr. *Morton*, in his Reply, said that the Words “ Such other
 “ Son of my Daughter *Margaret*” may be taken to mean “ such
 “ other Issue” of his Daughter.

LORD MANSFIELD—We'll think of it. The Meaning of
 the Testator was to form another Family. He meant to exclude
 the Eldest; and to give Estates in Succession to the other Sons,
 exclusive of the Eldest: His Intention is plain.

CUR'. *advizare vult.*

LORD MANSFIELD now delivered their Opinion: Which was
 to the Effect following.

We are all of One Opinion, with Regard to the Construction
 of this Will. It is very imperfectly drawn: And the material
 Words in many Parts are totally omitted.

It is plain what the Testator *meant*: He meant to give the Estate to his second Grandson *Layton Lowndes* and his Issue, in the first Instance; and, in Case of Failure of *Layton's* Issue, to such of his other Grandsons as should happen to be the Second Son of his Daughter *Margaret*, by Mr. *Lowndes*, at the Time of her Death, and to their Issue, in Tail; and in Case of Failure of all their Issue, then according to the subsequent Limitations mentioned in his Will.

He meant to make a new Family in the then second Son, or whoever should afterwards become the second Son of his Daughter by her then Husband.

Though this was manifestly his *Intention*, I was extremely afraid that there were not *Words* enow to warrant Us to put this Construction upon it.

But I think there are Words sufficient to justify a Construction agreeable to the Intention of the Testator.

The first Limitation is to *Layton Lowndes*, in Tail; then to such other Son as might be the second Son of *Margaret*, living at the Time of her Decease. The subsequent Limitation is upon a Contingency which has *not happened*; viz. *Layton Lowndes's* becoming the Eldest Son in *Margaret's* Life-time; which he *never did*.

The last Limitation implies an *Estate-Tail* in the second Son of *Margaret*, and those that should become so at her Death, successively. Then he goes on—"And if his Daughter should survive all her Children by her then Husband, and the Heirs of such Children," then he gives it over.

Therefore the *former* Limitations to the second Son of his Daughter *Margaret* must also be construed to have been an Estate-Tail.

Consequently, All the Sons, except the Eldest, are to take successively in Tail. It is immaterial whether Tail Male or Tail General: It is enough, that they take an Estate Tail.

The Judgment must be for the Plaintiff.

RULE, accordingly,

That JUDGMENT be entered for the PLAINTIFF.

Abrahams,

Abrahams, *qui tam*, *versus* Bunn,

Wednesday
22d June
1768.

THIS was an Action for an usurious Contract, tried before Lord Mansfield, at Guildhall; and a Verdict found for the Plaintiff. Upon which, a Motion had been made, on the Part of the Defendant, for a new Trial; and a Rule granted, to shew Cause.

The Motion was founded upon the Incompetency of the Plaintiff's Witness.

The Name of the Witness was *Benjamin Abrahams*. He was the *Borrower* of the Money; and was called, on the Part of the Plaintiff, to prove the usurious Contract. He was sworn in Chief; and examined, and cross-examined, before he was objected to.

He proved the Defendant to be a Pawnbroker; and that he had pledged several Jewels with him, on several Loans; some of which were redeemed: And he owned that this *Pledge had been returned*, on the Money borrowed upon it being paid. The Contract was proved by him to be usurious: And he proved it as it was charged in the Declaration.

At the Trial, after this Man had given his *whole* Evidence, it was objected that he could not be a *competent* Witness, unless the *Repayment* of the Money was proved; and that *he* himself was not competent *to prove the Repayment* of it.

After this Case had been fully argued at the Bar—

The COURT having taken Time to advise—

LORD MANSFIELD now delivered their Opinion.

This was a Motion for a *new Trial*; because *Benjamin Abrahams*, said to be an *incompetent Witness*, was examined, and his Evidence left to the Jury.

It was a *qui tam* Action upon the Statute against Usury. All the Counts charge “ that the Defendant took accepted and received from *Benjamin Abrahams*, the Sum of so much, by Way of corrupt Bargain and Loan, for his forbearing and giving Time of Payment from such a Day to such a Day, of the Sum actually lent.”

3

There

There was *no* Count as to any *Bond, Assurance, or Contract*, whereupon or whereby Usury was reserved or taken.

At the Trial, *Benjamin Abrahams* was examined for the Plaintiff; and swore that the Defendant was a Pawnbroker; that he borrowed from the Defendant several Sums of Money, (specifying the Times and Sums) upon Pawns, (specifying them and their Value,) which were always more than double the Value of the Money advanced.

He swore to his having redeemed the Pawns, (specifying the Times;) and that the Defendant, before he would re-deliver the Pawns, took and insisted upon the Sums mentioned in the Declaration, over and above the Principal; which the Witness paid together with the Principal, and received back his Pawns.

He proved no Bond or Assurance or Contract for Usury, at the Time of the Loan; or for repaying the Money: Nor was any such additional Security necessary; because the Pawn which was double the Value of the Debt, was the Security, and was sufficient to pay it, unless redeemed.

He was cross-examined: And after he had given his *whole* Evidence, he was objected to as incompetent, (from what he had himself said, without any Evidence whatsoever on the Part of the Defendant,) because the *Re-payment* of the Money lent was not proved by *some body else*.

In Strictness, the Objection came too late; after he had been sworn in Chief; examined, and cross-examined.

The Strictness of Law, in this Respect, is very wise, and ought to be more adhered to: For, the Relaxation may be abused, and must always occasion Waste of Time.

But I did not take it up upon this Foot “of the Objection’s “coming too late.” I considered the Objection as if it had been regularly made before he was examined in Chief, and as if the Whole of his Evidence had come out upon the *Voir dire*: And in giving our Opinion now, we consider it upon the *mere Merits* of the Objection, supposing it duly and regularly made.

There is no Case relative to the Borrower’s Competence to be a Witness upon a penal Information against the Usurer, wherein either the Pleadings are stated, or the Facts of the Case stated, or any Argument by Counsel or the Bench reported.

There

There is no Case where the Question ever came before any Court in *Westminster-Hall*, except in *Smith's Case*, Tr. 8 Jac. 1. in C. B. upon a Trial at Bar. 2 Ro. Abr. 615. Title "Trial," Letter G. pl. 2. Co. Litt. 6. b. and many other Books.

Two Reasons are there given for universally rejecting the Testimony of the Borrower: 1st. Because 'tis to be presumed really his own Cause, and that the nominal Plaintiff is set up colourably by him; 2dly. Because it would enable him to avoid his own Securities, and discharge himself of the Money borrowed.

The first Reason is *now* totally exploded: For, he is not *now* presumed to be the Plaintiff in the Cause.

As to the second—The Proposition laid down is too large. For, there may be Usury which cannot affect the Debt, or avoid the Contract. The Clause that avoids the Contract, is where the Contract is for more than Five *per Cent*'. But if a Contract be for only Five *per Cent*'; and the Lender afterwards takes more, he is liable to be prosecuted for Usury, and to pay the Penalty, though it does not avoid the Contract. And where it would affect the Debt, it may have been * paid.

* V. Long's
Case, Sir T.
Raym. 191.

All the other Cases are loose Notes of *Sayings*, or *Opinions* at *Nisi prius*; general Assertions, general Inferences, without Particulars, without Argument, without Consideration, without any State of Pleadings or Facts.

This Question having now come before the Court, it is necessary to consider it with Accuracy and Precision.

The Objection to the Competence of the Witness can only be supported by arguing, either "that the Event of this penal Prosecution in Favour of the Plaintiff will *avoid* the Bond Assurance or Contract of the Witness, and *discharge* him from the Debt;" or, "that this Cause turns upon the *same* Points and Transactions which, if proved in *another* Cause, would avoid the same."

The Foundation fails in both Propositions: And the Consequence would not follow in the last, if the Premises were true.

No Contract or Assurance appears here, for Usury; or so much as to repay the Money. And if there was, the Recovery of the Penalty upon this Information would not affect the Contract. The Judgment in this Action could not be given in Evidence in

an Action for the Debt; though the Validity of the Contract depended upon the same Grounds as the Information. That might indeed be a Prejudice, Influence or Bias upon the Mind of the Witness, and go to his *Credit*; but not an actual Interest, to go to his *Competence*.

This Distinction has not been sufficiently attended to, at *Nisi prius*: The Cases are contradictory; and it is impossible to reconcile them.

The great Deference to Lord Chief Justice *Holt's* Opinion made the Case of *The King v. Whiting**, to be followed for some Time: Nay, Lord *Hardwicke* implicitly followed it in that of *The King v. Nunez*†. P. 9 G. 2.

At that Time there were many Cases both Ways; a String of both Sorts; (and amongst the Rest, *Watt's* Case, in *Hardres* 331, 332. "that in Forgery, Perjury, or Ufury, the Party "grieved shall not be admitted as a Witness, because he may "receive a consequential Advantage from the Verdict;" and *Parris's* Case, in 1 *Ventris* 49. where such a Witness was admitted :) None of which Cases were considered or looked into.

† First moved, on 26th October 1736. argued in Hilary Term 1736. and determined on Friday 11th February 1736.

|| Lord *Hardwicke's* Words were (as I took

them in my Note,) "If that Case was strictly examined, I believe it would appear that the Objection in that "Case went rather to the *Credit* than to the Competency of the Witness."

§ N. B. This Case was very fully discussed; and the Opinion of all the Judges taken. Lord Chief Justice Lee held the Objection to go to the Competency:

So did Mr. Justice Denison. But Lord Chief Justice Willes, Lord Chief Baron Parker, Reynolds, Abney, Burnet and Wright; "that it went to the *CREDIT* only." A new Trial was therefore ordered, on Friday 13th May 1743, Tr. 16 & 17 G. 2.

But since the Case of *Whiting* and the Case of *Nunez*, there has been great Light thrown upon the Distinction between INTEREST, which affects the *Competence* of a Witness; and INFLUENCE, which goes only to his *Credit*. There have been the Arguments and Judgment in the Case of *Rex v. Bray*, Mayor of *Tintagel*‡, where Lord *Hardwicke* shook the Authority of *Rex v. Whiting*; which he there, in Effect, contradicts, (though with guarded Decency of Expression,) notwithstanding his having before followed it in the Case of *Nunez* ||.

Then came the Case of *The East India Company v. Gosslen* §. There was also a Case of *Bailie v. Wilson*, (about the Proof of a Will,) before the Delegates: Who were *equally divided* "Whether "the Objection should go to the *Competence* or *Credit* of the only "Witness who proved a *Codicil*, subsequent to a second Will, "setting up again the first Will;" and therefore no Sentence was given. Thereupon a Commission of Adjuncts issued: A Majority

of whom (Mr. Justice *Denison* being one) held “that it went
“only to the *Credit* :” And Sentence was given for the first Will.
Upon a Petition for a Commission to review, it was fully ar-
gued : And Lord *Hardwicke*, on 15 Jan. 1744, gave a solemn
Opinion with the Majority of the Adjuncts, “That the Witness
“having administered under the first Will as Agent to the Exe-
“cutor, or as Executor *de son Tort*, and being liable to Actions,
“the Objection went only to the *Credit*, not to the Com-
“petency.”

The solemn Discussion in these Three Cases drew the Line be-
tween INTEREST, which goes to the Competence ; and INFLU-
ENCE, which goes to the Credit, more clearly than had before
been understood.

It established a Rule, “that where the Matter was *doubtful*,
“the Objection should go to the CREDIT.”

It established, “that the Question in a Criminal Prosecution
“being the same with a Civil Cause in which the Witness was
“interested, went *generally* to the Credit ; unless the Judgment in
“the Prosecution where he was a Witness could be given in
“Evidence in the Cause where he was interested.” I say “*gene-
“rally* ;” (because all Rules of Evidence admit of Exceptions.)

After these Cases, in that of *Rex v. Broughton* in 1745 *, Lord • 2 Str. 1229.
Chief Justice *Lee* over-ruled the Three Cases of *Rex v. Whiting* †, † 1 Salk. 283.
Rex v. Nunez ‡, and *Rex v. Ellis* || : Which Opinion of his has ‡ 2 Str. 1043.
been followed since, and approved. || 2 Str. 1104.

There has been a remarkable Case since I left the Bar, in
Trinity Term 32 & 33 G. 2. Bartlett v. Pickersgill. The De-
fendant bought an Estate for the Plaintiff : There was no
Writing, nor was any Part of the Money paid by the Plaintiff.
The Defendant articulated in his own Name, and refused to convey ;
and by his Answer denied any Trust. Parol Evidence was re-
jected : And the Bill was dismissed. The Defendant was after-
wards indicted for Perjury ; tried at *York* ; and convicted upon
Evidence of the Plaintiff, confirmed by Circumstances and the
Defendant’s Declarations. The Plaintiff then petitioned for a
supplemental Bill in Nature of a Bill of Review ; stating this
Conviction : But the Petition was dismissed, because the Con-
viction was not Evidence, 22d November 1762.

This Reasoning shews too, that, if it was necessary, the Wit-
ness was competent to be heard, as to the Debt being paid : The
Recovery could not be Evidence. What he swore could not be
Evidence in an Action for the Debt.

There is no Danger or Perjury, from hearing him. The Defendant may produce the Security, and falsify him. If (as here) it is the Case of a Pawn, the Witness would swear against his own Interest to say untruly, "the Debt was paid, and the Pledge returned." But, *either* Way, the Debt is paid: For, unless the Pledge be redeemed, it is a Satisfaction.

Suppose a Witness produces a Bond or Note or Mortgage cancelled—Suppose he produces a Receipt—There can be no Danger in hearing him: For, the Jury are not bound to believe him. That depends on Circumstances, which may contradict or support his Testimony.

But if it be necessary to prove Payment, and the Party is not to be heard as a Witness to prove such Payment, the Statute would be as effectually repealed as if the Borrower could never be a Witness at all: For, they never would suffer any Body else to be privy to the Payment, delivering up, or cancelling the Securities.

But to go further—All Objections to the Competence of the Witness must either be *proved*, or drawn from him upon a *Voire dire*; or, to take it in the utmost Latitude, upon his *Examination*.

Here was no Proof of any Objection; or of any Debt remaining. The Witness swore, "that he should neither gain nor lose by the Event of the Cause;" in every Shape in which the Question could be put: And he shews it, by giving an Account of the Debt being paid. He swore, upon a *Voire dire*, "that it was paid."

Had the Defendant produced a Security, or proved the Pledge to be remaining in his Custody; it would have been a different Consideration, "Whether the Witness, who was the Borrower of the Money, could be examined to contradict this." But when the whole Ground of the Objection comes from himself only, what he says must be taken together, as he says it: And then the Debt is paid.

In every Light, We are All of Opinion "that, under all the Circumstances of this Case, BENJAMIN ABRAHAMS was a competent Witness:" And consequently, the Rule ought to be discharged.

RULE DISCHARGED.

The End of Trinity Term 1768, 8 G. 3.

Michaelmas Term

9 Geo. 3. B. R. 1768.

Rex *versus* Praed, or Rex *versus* Edwards.

Tuesday 8th
Nov. 1768.

(The *St. Ives* Causes.)

A Criminal Motion was put off, till the Validity of a Rate should be tried in a feigned Issue, "Whether it was an equal, or a partial one." And a Verdict having passed *for the Defendant*, upon such Issue,

Mr. Solicitor-General (*Dunning*) moved, and was seconded by Sir *Fletcher Norton*, for a new Trial; the Verdict having been given contrary to Evidence.

But the COURT were clear against granting a new Trial; *because* it was within the *same Reason* as if it had been in a *criminal* Prosecution. For, as this Issue was directed in order to know "Whether this was an illegal and partial Rate;" and if it had been found to be partial, the Consequence would have been either an Attachment or an Information; It was just the same Thing as if it had been a Verdict found for the Defendant *upon an Information*: And if it had been *upon an Information*, the Court would not have set aside the Verdict and granted a new Trial, although the Acquittal had been contrary to the Weight of the Evidence.

However, it was agreed that when the original Motion should come on again, it would be open to any *other* Objections to the Legality of the Rate; only taking it for a Fact, "that it was *not* a partial one."

Tuesday 15th
Nov. 1768.

Matson versus Scobel.

THIS was an Action brought for taking the *Ramsgate-Duty*, of a Ship which passed the Harbour on the North-East Side of the *Godwin-Sands*, and not through the Downs.

There was a Verdict for the Plaintiff, subject to the Opinion of the Court.

The Question was—"Whether, upon the Construction of the "Act of 22 G. 2. c. 40. the Duty was payable, or not, by a "Vessel passing on the North-East Side of the *Godwin-Sands*, "and not through the Downs."

The COURT were very clearly of Opinion for the Plaintiff, "that the Duty was *not* payable." There is no Reason in the present Case, for his being charged with it. He has no Equivalent.

The Duty is payable for the Advantages received. But this Ship received no Benefit from the Harbour.

They looked upon the fourth Clause, imposing the same Rates and Duties upon *Foreign* Ships passing through or being detained in the Downs, as upon Ships cleared out or entered into any of the *British* Ports, "*because* they would receive the same Benefit "as *British* Ships," to be decisive.

Per CUR. unanimously—

Let the POSTEA be delivered to the PLAINTIFF.

Tuesday 22d
Nov. 1768.

Stevens Esq. versus Duffty.

THIS was an Action of *Trover* for Three Horses, Three Mares, and Three Geldings; founded upon the Statute of 7 G. 3. c. 40. intituled "An Act to explain amend and reduce "into One Act of Parliament the general Laws now in being "for regulating the Turnpike-Roads of this Kingdom, and for "other Purposes therein mentioned."

It came on to be tried before Mr. Baron *Perrott*, at the last *Summer-Assizes* for the County of *Devon*. It appeared in Evidence that a Four-wheeled Waggon, of which the Defendant was then the Owner, having the Fellies of the Wheels of less Breadth

Breadth than Nine Inches, viz. Three Inches and no more, upon 1st *March* 1768, did pass and was drawn with Seven Horses of the Defendant's on a Turnpike-Road in *Little Torrington* in the said County, being a Road within an Act of 3 G. 3. "for repairing, widening, and keeping in Repair several Roads leading from the Town of *Barnstaple* in the County of *Devon* &c." • Cap. 35.

The said Waggon was loaded with ONE *Piece of Timber only*, which the Defendant was conveying from *Huish* the Place of his Residence, and where the Timber was felled, to *Ware Gifford*: And *Huish* is distant from *Ware Gifford* about Nine Miles; of which, Two Miles and Half are over the said Turnpike-Road.

The Plaintiff, on the 12th of the same Month of *March*, caused Notice in Writing to be given to the Defendant in the following Words—"To Mr. *John Duffy*—Take Notice that "I shall bring an Action against you, to recover the Sum of 20s. "and Three of your Horses forfeited by drawing your Four-wheeled Waggon or Carriage having the Fellies of the Wheels "of less Breadth than Nine Inches, with Seven Horses, on "*Barnstaple* Turnpike-Road in the County of *Devon* on the 1st "Day of *March* Instant, contrary to an Act made in the seventh "Year of His Majesty's Reign intitled &c (repeating the Title "of the Act *verbatim*. Dated the 12th Day of *March* 1768. "*Henry Stevens*." And upon the 24th of the said Month of *March*, sued out the *Latitat* for this Cause.

The Jury found a Verdict for the Plaintiff, with 20s. Damages; subject to the Opinion of this Court—"Whether the Plaintiff can maintain or recover in this Action."

It was now argued by Mr. *Mansfield* for the Plaintiff, and Mr. Serjeant *Burland* for the Defendant.

Three Objections were made—First—That Drawing a single Piece of Timber, on a Turnpike-Road, with more than Four Horses, is *not prohibited* †.

† Vide 7 G. 3. c. 40. § 23. and vide 7 G. 3. c. 42. § 40. which excepts

out of the Regulations of that latter Act, all Carriages employed only in carrying any one Piece of Timber.

2d. That the *Notice* was not sufficient. 3d. That this Action is *not the proper Method* of recovering the Penalty, which consists of Two Parts; One, pecuniary; the Other, a specific Forfeiture of the Horses.

Lord MANSFIELD said it was hard, to be obliged to change Wheels or Carriages as the Piece of Timber should come to a Turnpike-Road upon which it was to proceed but a short Space.

Space. Yet the Parliament have *not* made any Provision for this, or for only crossing Turnpike-Roads; though they have had it several Times under their Consideration. This is the principal Point in the Case.

It is admitted, that there is no Exception of a single Piece of Timber, out of the Turnpike Acts.

As to the other two Objections—There is no Difficulty.

1st. The Plaintiff might bring an Action of Debt for the Penalty, or of Trover for the Horses, if there was no Provision. But the Act provides that there shall be but one Recovery. The Plaintiff therefore waves the Penalty, and proceeds for the Horses.

2d. The Notice is *full* enough. The Act does not require it to be more particular.

POSTEA to be delivered to the PLAINTIFF.

Saturday 26th
Nov. 1768.

Rex *versus* Breton Esq. Mayor, and Jeyes, Gent.
Town-Clerk of Northampton.

THIS Case now came on, in the Crown-Paper, on a Demurrer to a special Plea to an Information in Nature of *Quo Warranto*, to shew by what Authority the Defendants claim the Liberty Privilege and Franchise of admitting Persons to be Freemen of the Town of *Northampton*, who had not any previous Title to it, by *Birth*, *Servitude*, or *Election*.

The Court had some Difficulty, at first, about granting an Information of this Kind; and ordered a Search for Precedents: Upon which Search, the following were found.

Hil. 10 W. 3. Rex v. Mayor Aldermen and Commonalty of the Borough of Hertford—To shew “by what Warrant they claim “to have and use *divers Liberties and Privileges* within the “said Borough.”

Pasch. 11 W. 3. Idem v. Eosdem—It was referred to Sir Samuel Astry, to examine the Process issued against the Defendants.

Mich. 11 W. 3. Idem v. Eosdem—Ordered that unless Cause be shewn to the Contrary, on &c, the several Issues returned upon the

the several Writs of *Distingas* against the Defendants be estreated into the Exchequer.

Afterwards, in the same Term, the above Rule was discharged, upon hearing the Master's Report.

Pasch. 11 W. 3.—A Rule was made upon *T. Warburton Esq.* late Mayor of *Holt* in *Denbighshire*, to shew Cause why an Information should not be exhibited against him, to shew by what Warrant he claimed the Privilege “to elect and swear *Peregrinos* “ & *Extraneos anglicè* *Foreigners* to be *Burgeses* of the said Borough, without the Consent of the Bailiffs and Burgeses of the Borough.”

Trin. 11 W. 3.—The above Rule was made absolute.

Mich. 11 W. 3. Rex v. Warburton—A *Superfedeas* was ordered to the Writ of Attachment upon that Information, *quia erroneè emanavit*: And all further Process upon the said Information was ordered to be stayed, until the Court should be further moved on the Part of the Prosecutor.

Hil. 7 Ann.—It was ordered that an Information in the Nature of a *Quo Warranto* should be exhibited against *Alexander John*, to shew by what Warrant he claims the Liberty and Privilege “to AMOVE *Capital Burgeses* of the Borough of *Lestwithiel* in Cornwall, and to choose others in their Places ad libitum suum proprium.”

Pasch. 3 G. 2.—A Rule was made upon *William Pole*, one of the Bailiffs of *Liverpoole*, and upon *Richard Norris* and others, Twenty-two of the Common Council of the said Borough, to shew Cause why an Information in the Nature of a *Quo Warranto* should not be exhibited against them, to shew “by what Warrant They, without the Mayor, and not being Twenty-five of the Common Council of the said Town, claim to have use and enjoy the *Liberty Privilege* and *Franchise* of electing approving and admitting Persons to be *Burgeses* of the aforesaid Town.”

Which Rule, after several Enlargements, was in *Mich. 4 G. 2.* made absolute.

And in *Pasch. 4 G. 2.*—Rules were given, to plead to an Information which had then been accordingly exhibited against them: And a Plea of *Disclaimer* was entered.

In *Mich.* 32 G. 2.—An Information in the Nature of a *Quo Warranto* was ordered to be exhibited against *Thomas Lewis*, Clerk, to shew by what Authority He claimed “to make and “*swear free Burgesſes of the Borough of New Radnor, without the “Concurrence of the Bailiff Aldermen and Capital Burgesſes of “the ſaid Borough.*”

And an Information was exhibited againſt him accordingly.

On theſe Precedents,

The COURT granted the Information.

It was ſettled by an eminent Hand; and was to the following Effect——

Trinity Term 8 G. 3. Northamptonſhire—to wit—Be it remembered &c, &c. That the Town of *Northampton* is an ancient Town; and that the Mayor Aldermen and Burgesſes of it now are, and for Thirty Years now laſt paſt and upwards, have been One Body Corporate and Politic &c, by the Name of the Mayor Bailiffs and Burgesſes of the Town of *Northampton*; AND that within the ſaid Town of *Northampton*, for and during the whole Time aforeſaid, there have been and ought to be a Mayor Two Bailiffs Eight Aldermen and Forty-eight Burgesſes, who have been and are, and have been and are called “The Company of “Eight and Forty, of the ſaid Town,” and an indefinite Number of Freemen of the ſaid Town; AND that the Place or Office of a Freeman of the ſaid Town is a Place or Office of great Truſt and Preeminence within the ſaid Town, touching the Rule and Government of the ſaid Town and the Adminiſtration of Public Juſtice within the ſaid Town; AND that the Mayor and Bailiffs of the ſaid Town for the Time being, and ſuch other Burgesſes of the ſaid Town as have been Mayors or Bailiffs of the ſaid Town, and the Company of Eight and Forty for the Time being, during all the Time aforeſaid have been and are the Common Council of the ſaid Town; AND that the Mayor and Bailiffs of the ſaid Town for the Time being, and ſuch other Burgesſes of the ſaid Town as have been Mayors or Bailiffs of the ſaid Town, and the ſaid Company of Eight and Forty for the Time being, or the major Part of them in Common Council aſſembled, have elected and ought to elect ſuch and ſo many fit Perſons to be *Freemen* of the ſaid Town, as to *Them* hath ſeemed meet; AND that *no Perſon* ought to be admitted a Freeman of the ſaid Town, UNLESS elected thereto in Manner aforeſaid, or intituled to be a Freeman of the ſaid Town by *Birth or Servitude*, according to the Cuſtom of the ſaid Town. THEN the Information

tion charges, THAT *Thomas Breton* of the said Town Esq. (being Mayor of the said Town,) and *John Jeyes* of the said Town Gentleman (being Town-Clerk of the said Town,) on 10th November 8 G. 3. did use and exercise, and from thence until the Time of the Exhibiting of this Information have there used and exercised, and still do use and exercise, without any legal Warrant, Royal Grant, or Right whatsoever, the *Liberty Privilege and Franchise* of ADMITTING *Persons* FREEMEN of the said Town, who had not nor have any PREVIOUS TITLE to be Freemen of the said Town, by *Birth Servitude* or *Election*; AND for and during all the Time last aforesaid, have there claimed, and still do there claim, without any legal Warrant, Royal Grant, or Right whatsoever, the *Liberty Privilege and Franchise*, of ADMITTING PERSONS to be FREEMEN of the said Town of *Northampton*, who had not nor have any PREVIOUS TITLE thereto by *Birth Servitude* or *Election*; And during the Time aforesaid, have, without any legal Warrant, Royal Grant, or Right whatsoever, ADMITTED *divers Persons*, to wit One hundred and Fifty Persons (whose Names are at present unknown to the said Coroner and Attorney) FREEMEN of the said Town; Which said Persons or Any of them HAD NOT ANY PREVIOUS TITLE thereto by *Birth Servitude* or *Election*: Which said Liberty Privilege and Franchise they the said *Thomas Breton* and *John Jeyes*, for and during all the Time last abovementioned, upon our said Lord the present King, without any legal Warrant Royal Grant or Right whatsoever, have usurped and still do usurp &c, &c. Whereupon &c, to answer &c, and shew by what Authority they claim to have use and enjoy the Liberty aforesaid.

To this Information the Defendants plead—THAT the Town of *Northampton* is an ancient Town, and that the Mayor Aldermen and Burgeses of it are and for Thirty Years past and upwards have been a Body Corporate and Politic; and that within the said Town, for and during the whole Time aforesaid, there have been and ought to be a Mayor, Two Bailiffs, Eight Aldermen, and Forty-eight Burgeses, who have been and are called “The Company of *Forty-eight* of the said Town,” and an indefinite Number of Freemen of the said Town; AND that the Mayor and Bailiffs of the said Town for the Time being, and such other Burgeses of the said Town as have been Mayors or Bailiffs of the said Town, and the said Company of *Forty-eight*, for the Time being, during all the Time aforesaid, have been and are the Common Council of the said Town, (as by the Information is supposed.) But the said *Thomas Breton* and *John Jeyes* further say, That the said Town of *Northampton* now is, and from Time whereof the Memory of Man is not to the contrary hath been, an ancient Town; and that the Burgeses of the said Town, at the Time of making the Letters Patents hereafter mentioned, to wit, the 3d of *August*

guft 15 C. 2. and from Time whereof the Memory of Man then was not to the contrary, had been, One Body Corporate and Politic, in Deed Fact and Name; And that within the faid Town and Borough there then was, and from Time whereof the Memory of Man was not to the contrary had been, and from thenceforth hitherto hath been, a certain Officer called a *Mayor* of the faid Town, and a certain other Officer called the *Town-Clerk* of the faid Town. And the faid *Breton* and *Jeyes* further fay, that King *Charles* the Second by his Letters Patent, dated 3d *August* 15 *Règni*, granted, that the Town of *Northampton* should be a free Town of itself; And that the Burgesſes and their Succeſſors ſhould be One Body Politic and Corporate, by the Name of the Mayor Bailiffs and Burgesſes of the Town of *Northampton*; and that there ſhould be a Mayor, and Two Bailiffs; and Forty-eight of the Commonalty, who ſhould be called “The Company of Forty-eight;” And that the aforeſaid Mayor and Two Bailiffs and ſuch other Burgesſes of the ſame Town who formerly had been or thereafter from Time to Time ſhould be Mayors or Bailiffs of the ſame Town, together with the aforeſaid Forty-eight Burgesſes called “The Company of Forty-eight,” ſhould be and be called “The Common Council of the Town aforeſaid;” and ſhould be from Time to Time aſſiſting and aiding to the Mayor of the faid Town for the Time being, in all Caſes and Matters touching or concerning the Town aforeſaid. And the ſaid late King further willed, and by the ſame Letters Patents granted to the aforeſaid Mayor Bailiffs and Burgesſes of the aforeſaid Town of *Northampton* and their Succeſſors, That the Mayor and Bailiffs of the Town aforeſaid for the Time being, and ſuch Burgesſes of the ſame Town which theretofore had been, or thereafter from Time to Time ſhould be, Mayors or Bailiffs of the ſame Town, together with the aforeſaid other Burgesſes called “The Company of the Forty-eight,” and their Succeſſors for the Time being, or the major Part of them, (of which major Part, the late King willed that the Mayor of the Town aforeſaid for the Time being, and ſuch Three other Burgesſes of the Town aforeſaid, which theretofore had been or thereafter ſhould be Mayors, commonly called Aldermen of the ſame Town, ſhould be One,) ſhould have full Power and Authority to conſtitute ordain and make, from Time to Time, ſuch REASONABLE *Laws Statutes and Ordinances whatſoever*, which to Them, according to their ſound Diſcretion (as aforeſaid) ſhould ſeem to be good and wholeſome, profitable, honeſt, and neceſſary for the good Rule and Government of the ſaid Burgesſes Artificers and Inhabitants of the Town aforeſaid, for the Time being; And for a Declaration, in what Manner and Order the aforeſaid Mayor Bailiffs and Burgesſes, and the Artificers and Inhabitants and Reſidents of the Town aforeſaid, for the Time being, ſhould have demean and uſe themſelves in their Offices Charges and Employ-
ments

ments within the Town aforesaid and the Limits of the same ; and for the further Good and public Service Government and Bettering of the said Town, and victualling of the same ; and for levying of Monies to the Use and Behoof of the said late King, his Heirs and Successors, or to the necessary Uses of the same Town ; And also for the better Preservation Government Disposing Letting and Setting of Lands Tenements Possessions Rents Revenues and Hereditaments to the aforesaid Mayor Bailiffs and Burgeses and their Successors given granted assigned or confirmed, or thereafter to be given granted or assigned ; and for Accounts Matters and other Causes whatsoever touching or any ways concerning the Town aforesaid, or the State Right and Interest of the same Town ; as by the same Letters Patent, amongst other Things, may more fully appear : Which same Letters Patent, afterwards, to wit on the said 10th Day of *August* in the said Fifteenth Year of the Reign of the said late King *Charles* the Second at the Town of *Northampton* aforesaid, the then Mayor Bailiffs and Burgeses of the Town of *Northampton* aforesaid *accepted and agreed to.* AND the said *Thomas Breton* and *John Jeyes* further say That the MAYOR and TOWN-CLERK of the said Town of *Northampton* for the Time being, from Time whereof the Memory of Man is not to the contrary, have *admitted*, and have *used* and been *accustomed* to admit, and during all the Time aforesaid of *Right* OUGHT to have *admitted to the* FREEDOM of the said Town of *Northampton*, ALL Persons having a *Right* to be admitted to the same ; whether by reason of *Birth* or *Servitude*, or by Virtue of any *Order* or *Orders* of the said Mayor Bailiffs and Burgeses, or in any *other* Manner howsoever ; to wit, at the Town of *Northampton* aforesaid. And the said *Thomas Breton* and *John Jeyes* further say, That on the 22^d Day of *October* in the Year of our Lord 1767, the then Mayor and Bailiffs and the major Part of such of the then Burgeses of the said Town who theretofore had been Mayors or Bailiffs of the same Town, and the other then Burgeses of the same Town called “ The Company of “ Forty-eight,” (whereof the then Mayor and three other Burgeses of the same Town, Each of whom had theretofore been Mayors of the same Town, were Four,) did, in due Manner, meet and assemble themselves at the *Guildhall* within the said Town, in order to consult compose constitute ordain make and establish such BYE-LAWS STATUTES ORDINANCES and CONSTITUTIONS, as to them should seem good wholesome profitable honest and necessary, according to their sound Discretion, for the better Rule and Government of the said Town of *Northampton* : And being then and there so met and assembled as aforesaid, for the Purposes aforesaid, They the said then Mayor Bailiffs and Burgeses of the said Town of *Northampton* did then and there in due Manner compose constitute ordain make and establish a certain good wholesome profitable honest and necessary ORDINANCE

or BYE-LAW, to wit,—“ That ANY Person or Persons (*not being* entitled to the Freedom of the said Town by *Birth* or *Servitude*) should be *thereafter* ADMITTED *to the Freedom* of the said Town, UPON PAYMENT of the *Price* or *Sum* of TEN POUNDS; Except such Person or Persons who had married or should be married (at the Time of their Admission) to the Daughter of a Freeman of the said Town; And *Those*, upon Payment of the Price or Sum of *Five* Pounds; with the usual and accustomed Fees; Provided that upon every such their Admission, they should respectively pay for the same, in *Cash* as aforesaid; and that no Note or other Security should be taken as a Consideration for such Freedom:”—As by the said Ordinance or Bye-Law, Relation being thereunto had, may more fully appear. Which said Ordinance or Bye-Law hath ever since the Making thereof hitherto been and ought to have been constantly observed and kept by the Mayor Bailiffs and Burgessees of the said Town of *Northampton*: And the same Ordinance or Bye-Law is still in full Force and Virtue, not in the least annulled abrogated or repealed. And BY VIRTUE of the said *Ordinance* or *Bye-Law*, the said *Thomas Breton*, being Mayor, and the said *John Jeyes*, being Town-Clerk, of the said Town of *Northampton* for and during all the Time laid and mentioned in the said Information in that behalf, at the said Town of *Northampton* in the County of *Northampton* aforesaid, have used and exercised and still do use and exercise the Liberty Privilege and Franchise of *admitting Persons* PAYING SUCH SUMS OF MONEY as by the said *Bye-Law* directed, to be FREEMEN of the said Town, *who had not nor have any* PREVIOUS TITLE to be Freemen of the said Town, by *Birth* *Servitude* or *Election*; and for and during all the same Time have there claimed, and still do there claim, the Liberty Privilege and Franchise of *admitting Persons* PAYING SUCH SUMS OF MONEY as by the said *Bye-Law* directed, to be Freemen of the said Town of *Northampton*; *who had not nor have any* PREVIOUS TITLE *thereto*, by *Birth* *Servitude* or *Election*; as it was and still is lawful for them to do. WITHOUT this, “ That no Person ought to be admitted a Freeman of the said Town, *unless* elected thereto in such Manner as in the said Information is mentioned, or intitled to be a Freeman of the said Town by *Birth* or *Servitude*;” as by the said Information is supposed: And also WITHOUT this, “ That they the said *Thomas Breton* and *John Jeyes* the said Liberty Privilege and Franchise in the said Information abovementioned, upon our said Lord the present King have usurped and do usurp, in Manner and Form as in and by the said Information is alledged *them*.” All and singular which said Matters and Things they the said *Thomas Breton* and *John Jeyes* are ready to verify as the Court shall award. Wherefore they pray judgment; and that the said Liberty Privilege and Franchise, so by them claimed in Form aforesaid,

aforesaid, may be allowed and adjudged to them; and that they may be dismissed and discharged, by the Court, hereof, and from the Premises above charged upon them.

To this Plea the King's Coroner and Attorney *demurs*, generally; and prays Judgment against the Defendants; and that they may be convicted and forejudged.

The Defendants *join in Demurrer*.

Mr. WALLACE, for the Prosecutor, objected that this Bye-Law, "That any Person, not intitled to the Freedom either by Birth or Servitude, should be admitted to the Freedom upon Payment of a certain *Price or Sum of Money*," was a *bad One*.

Mr. ASHURST, *contra*, for the Defendants, argued that it is a good and valid One.

The COURT were clearly of Opinion, "That this Bye-Law was an Alteration of the Constitution given by the Crown; and void."

ACCORDINGLY—

Per CUR'. unanimously—

JUDGMENT for the KING.

Dickson *versus* Fisher.

Monday 28th
Nov. 1768.

THIS was an Action of Debt, upon the Statute of 2 G. 2. c. 24. "For the more effectual preventing Bribery and Corruption in the Elections of Members to serve in Parliament."

The Defendant pleaded the general Issue.

Upon the Trial (at the last Summer Assizes for *Essex*), the Plaintiff gave in Evidence the Writ which issued to the Sheriff of the County of *Essex*, with his Return indorsed: To this was annexed the Indenture of Return between the Mayor and Commonalty of the Borough of *Colchester* of the one Part; and the said Sheriff, of the other Part.

He also gave in Evidence the *Precept* issued by the said Sheriff to the Returning Officer for the Borough of *Colchester*, disannexed and separate from the said Writ and Indenture.

Upon

Upon the *Face* of the Precept, the Words "*and Commonalty*" appeared to have been inserted; and though struck through with a Pen, yet remained *legible*.

It appeared further in Evidence, that the Precept was originally annexed to, and returned with the Writ and Indenture to the Sheriff; but was not filed, with the same, in the Crown-Office.

The Defendant offered *parol* Evidence, by the Mayor, to shew that the said Words "*and Commonalty*" were in the Precept, and no wise obliterated, when the same was delivered to the said Mayor, and when it was returned by Him to the Sheriff annexed to the said Indenture.

The QUESTIONS stated for the Opinion of the Court were—

1st. Whether the Instruments above stated, and given in Evidence by the Plaintiff, *sufficiently prove and support the Declaration*; viz. "That the Precept, *in the Declaration mentioned*, issued, "directed to the Mayor of Colchester."

2dly. Whether the above *Parol-Evidence* that the Words "*and Commonalty*" were not obliterated, when the Precept issued from the Sheriff and was delivered to the said Mayor, and when it was returned by Him to the Sheriff, was *admissible*, and ought to have been received.

It came on to be argued on *Tuesday* last (the 22d Instant) by Mr. Serjeant *Leigh* for the Plaintiff, and Mr. *Harvey* for the Defendant.

Mr. Serjeant *Leigh*—The Precept was the *best* and the *only* Evidence whereby We could prove our Averment "that the "Precept issued."

They could not bring *Parol-Evidence* against the *Record*. The *Record* must be averred, *as* it stands upon the Face of it: And, as it stands, it is directed "to the *Mayor* of the Borough "of *Colchester*."

But if it should be admitted that the Words "*and Commonalty*" are, in Fact, not obliterated; yet, it is a Precept directed to the *Mayor*: And no other Person has any Thing to do with it. By the express Direction of the Statute of 7 & 8 W. 3. c. 25. § 1.—the Precept is to be delivered to "the *proper Officer* of every "Borough &c; and to *no other Person whatsoever*."

Therefore the additional Words “ and Commonalty” would be *nugatory*.

Mr. *Harvey, contra*—This is an Action upon a very penal Act of Parliament; the *Particeps Criminis* is admitted as Evidence; and it is a hard Verdict: Therefore we may reasonably insist upon every Thing that we can object to.

The Plaintiff sets forth, That the Sheriff issued his Precept directed “ *to the Mayor of Colchester.*” The Precept produced in Evidence is directed “ *To the Mayor and Commonalty.*” This is quite *another* Precept; and does not support the Declaration.

By 7 & 8 W. 3. c. 25. the Precept is to be * directed to the Corporate Body; though it is to be delivered to the Returning Officer. And the constant Practice is so†.

* V. Sect. 1.
† By 23 H.
6. c. 15. § 1.
The Precepts
are to be di-
rected “ To
“ the Mayor
“ and Bailiff;
“ or Bailiffs
“ or Bailiff,”
where there
is no Mayor.

But these Words “ and Commonalty” were *not* obliterated: The Case only states “ that a Pen appeared to have been drawn “ *through* the Words and Commonalty; but that they still re- “ *main legible.*”

They ought to have shewn by parol Evidence, “ that there “ was an Obliteration, prior to the Delivery.” This they did not do.

On the contrary, I offered the parol Evidence of the Mayor, “ that there was *no* Obliteration at all, when the Precept was “ delivered to Him.” And this was a mere Matter of Fact collateral to the Record. It was only to shew *what* the Record was. They ought to have offered parol Evidence, to prove it: And we ought not to have been refused to give Evidence “ that “ the Precept produced by them was *not* the true Record.”

This is a material Variation in the Direction of the Precept. Of which, 2 Salk. 660. *Queen v. Dr. Drake*, is a Proof: Where, in setting forth a Sentence of the Libel, it was recited with the Word “ *nor*” instead of “ *not* ;” but the Sense was not altered thereby; and yet it was holden a fatal Variance. The present Variation is much greater than that. The Record ought to have been set forth exactly *as it is*. In 6 Mod. 167. *Queen v. Carter*, which was an Indictment for Perjury, a slight Variation in reciting a Record was a good Objection.

The Words stand legible in the Record produced in Evidence; and make a *fatal* Variance from the Declaration.

Mr. Serjeant *Leigh*, in Reply, denied it to be a *hard* Verdict; and said that the Cases cited do not apply to *this* Case.

The *Direction* of the Precept should be to the Returning Officer, who is to do the Acts thereby required.

The Question stated shews that the Words were *obliterated* at the *Time of the Trial*.

We were to form our Declaration upon the Precept as it stands: We are *not* to account for the *Alteration*. We were only to produce the Precept, to shew that it is *as* we have declared. And it now stands directed *as it ought to be*.

LORD MANSFIELD—These Precepts ought to be directed to the Returning Officer. The Plaintiff searches the Office, and finds it with this Alteration or Correction. These Words were put in by Mistake: They are therefore struck out. They would be Surplusage, if they stood there. It is the same as if they had never been in. The Precept ought to be directed to the Returning Officer: And the Practice is so. Therefore as the Plaintiff has produced the Precept, no parcel Evidence ought to be received, to make it erroneous.

The REST of the COURT concurred.

Per CUR'. unanimously—

Let the POSTEA be delivered to the PLAINTIFF.

But it was delayed for Two Days, upon Mr. *Harvey's* desiring to have an Opportunity of moving for a new Trial; which he could not do, by the Practice of the Court, without laying a *special Ground* for such a Motion. He suggested, that he had Reason to apprehend that the Judge who tried the Cause was of Opinion against the Verdict.

On *Friday* last, the 25th Instant, Cause was shewn why the Defendant should *not* be at Liberty to move for a new Trial.

The Cause shewn was, That by a general Rule of the Court, no new Trial can be moved for, after the *first Four* sitting Days, (*i. e.* *Sundays* excluded) of the Term; *unless special Leave* be asked and obtained, for this Purpose.

And the Counsel for the Plaintiff relied on this established *Practice* of the Court. There was no Reason, they said, to take

this Case out of the common Rule ; no special Ground laid, to induce the Court to depart from it : It was the *mere Laches* of the Attorney.

N. B. The Affidavit of the Attorney (Mr. *Ward*) was no more than that he was not at first instructed about it ; and when he was so, he did not apprehend that he was precluded from moving for a new Trial after the Four Days were expired.

LORD MANSFIELD—The great Ground of the Motion is a Suggestion “ that Mr. *Harvey* has Reason to apprehend that “ Mr. Baron *Smythe*, who tried the Cause, is of Opinion against “ the Verdict.” If that is so, there seems to be Reason for their being let in to apply now, for what we should have granted if they had applied in Time.

Mr. Justice YATES added another Reason for it ; *viz.* That in Order to come at Justice, the Court might relax their own Rule ; since the Attorney might consider the Matter as still depending, till the Case was argued. And he observed, that this is a Sort of Criminal Case, attended with heavy Consequences.

ADJOURNED till Mr. Baron *Smythe*’s Report should be obtained.

Mr. Justice WILLES now communicated the Baron’s Report : Which specified the Evidence, and did not express any Dissatisfaction with the Verdict

LORD MANSFIELD—This was a Motion for Liberty to move for a new Trial, though the Four Days were elapsed, which are by the Rule and Practice of the Court limited for making Motions of that Sort. It has been objected, “ that no such “ Motion can be made after that limited Time ; as no Leave was “ given for it.” But if there appear, under the particular Circumstances of the Case, *sufficient Grounds* to us, to excuse the Delay ; and that, to attain Justice, there ought to be a new Trial ; we may make an Exception to the general Rule of Practice. And therefore we desired (amongst other material Circumstances) to have the Judge’s Report of the Evidence. The Judge does not declare any Dissatisfaction at the Verdict. He certifies the Particulars of the Evidence ; and that the Jury gave their Verdict upon believing a Witness for the Plaintiff, though he was contradicted by some of the Defendant’s Witnesses. The Jury had a Right to judge of the Credit of the Witness :
It

It was their proper Province. There does not appear to be sufficient Reason to set aside this Verdict and direct a new Trial. Therefore the Rule must be discharged.

RULE DISCHARGED.

Rex versus Inhabitants of Stanlake.

See this *Case* in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 192. Page 627.

Rex versus Inhabitants of Notton.

See this *Case* in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 193. Page 629.

Rex versus Inhabitants of Bitton.

See this *Case* in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 194. Page 631.

Rex versus Inhabitants of Garway.

See this *Case* in the Quarto-Edition of my SETTLEMENT-CASES, N^o. 195. Page 632.

The End of *Michaelmas* Term 1768. 9 G. 3.

Hilary

Hilary Term

9 Geo. 3. B. R. 1769.

Grey *versus* Smithyes and One Other.

Thursday
26th January
1769.

THIS was an Action on the Statute of 7 & 8 W. 3. c. 25. "for the further regulating Elections of Members to serve in Parliament, and for the preventing irregular Proceedings of Sheriffs and other Officers, in the electing and returning such Members."

The Cause of Action arose at an Election of Members of Parliament for the Borough of *Colchester*. It came on to be tried at the Assizes for the County of *Essex*: And the Plaintiff was nonsuited, by the Opinion of the Judge who tried it.

The Declaration stated the Writ for the Election, and the Delivery of it to the Sheriff; and that the Sheriff, by Virtue of it, made a Precept to the Mayor of *Colchester*, who was the proper Officer; and delivered it to him; and that the Mayor indorsed the Day of his Receipt thereof in his Presence; and forthwith caused public Notice to be given of the Time and Place of Election; and proceeded to Election thereupon within Four Days after his Receipt of the Precept &c.

On the Precept being produced, it appeared that it was delivered to the Mayor, *in the Presence of Two* SUBSCRIBING Witnesses who attested such Delivery of it to him: But this Proof was not offered to be made by either of Themselves, but by a third Person.

The Objection to this Evidence was "That the *Proof offered*, of his Delivery of the Precept to the Mayor, was *not by the Evidence of EITHER of those Two subscribing Witnesses*, but by PART IV. VOL. IV. "another

“another Person.” And *upon this* Objection, Mr. Justice *Bathurst* nonsuited the Plaintiff. Whereupon, the Plaintiff moved for a new Trial; and the Judge made his Report: Which it is not necessary to particularize. The latter Part of it stated the Objection.

Upon shewing Cause against a new Trial, on *Thursday* the 24th of *November* 1768—

Sir *Fletcher Norton* and Mr. *Cole*, on behalf of the Plaintiff, agreed that *if* it was necessary to prove the Indorsment, it ought to have been proved *by the instrumental* Witness: But they *denied* that it was at all NECESSARY to prove the *Indorsment*. All that was necessary to be proved was the Right to choose Members; the Writ being delivered to the Sheriff; the Delivery of the Precept to the Returning Officer; and the going to an Election thereupon.

Mr. *Morton*, *contra*, for the Defendant—

The Plaintiff ought to prove “that there was a good Election had:” And the Delivery of the Precept to the *proper Returning Officer*, is a necessary Step towards a good Election. Therefore it ought to be properly proved.

* Vide 7 & 8 W. 3. c. 7. § 5. and by 10 & 11 W. 3. c. 7. § 1. the Writ is to be returned to the Clerk of the Crown in Chancery, to be by him filed.

The Precept was a *Record*. By 23 H. 6. c. 15. § 1. It is to be returned to the Sheriff by Indentures: And by a subsequent Statute, the Return is to be filed in the Petty-Bag Office*. The Precept, being annexed to the Indenture, is a Record, and must be proved *as* a Record. But this Precept was *taken off from the Indenture*; and thereby became only an *Instrument*, not a Record. This Instrument therefore ought to be proved *as an Instrument*. And this Instrument having a *subscribing Witness* to the Delivery of it to the Mayor, it ought to have been proved *by this subscribing Witness*, as being the *best* Evidence that could be had.

Therefore, as it was a *Requisite* to this Election “that the Precept should be delivered to the Mayor;” and also “that such Delivery be properly proved;” and here are *Two subscribing Witnesses* to this Delivery; the Delivery ought to have been proved *by One at least, of the subscribing Witnesses*: For Want of which, the Plaintiff was *properly nonsuited*.

The COURT took Time to advise.

Lord MANSFIELD hinted, that the Attestation of the Witnesses relates to the *Time* of the Precept's being delivered to the

the Returning Officer. But the *Time* of such Delivery is not, in *this* Case, necessary to be proved.

CUR' *advifare.*

On *Saturday* 26th of the same *November* 1768, Lord *Mansfield* delivered the Opinion of the Court.

The latter Part of Mr. Justice *Bathurst*'s Report was " That
" as neither of the Persons, who attested the Indorsment of the
" Day the Mayor received it, was called, He thought there
" should be a Nonsuit against the Plaintiff."

Upon this, the Counsel acquiesced, and proceeded no further. But that was only Decency: By which, they ought not to suffer. It is always decent for the Counsel to acquiesce in the Opinion of the Judge, at the Trial: But it is not reasonable that the Parties should be bound down by it, if that Opinion be wrong.

Though this is an unfavourable Case, and the Bribe so low*; * It was only half a Guinea.
yet this comes before the Court as a *general Rule of Evidence*: And if the Court should agree with Mr. Justice *Bathurst*, it would be *always* necessary to prove the Time of the Delivery of the Precept.

The Question agitated before him was " Whether the Delivery of the Precept to the Mayor was necessary to be authenticated by the Witnesses who had *subscribed* their Names in Attestation of such Delivery."

WE ALL think, that if it had been the Case of the *Mayor himself*, such an Attestation of the *Time* of the Delivery of the Precept to him and of his indorsing it in the Presence of the Person who delivered it to him, might be material: And the Rule " of the *instrumental* Witnesses being the proper Witnesses " to prove a Fact which they have attested, (as being the best " and properest,") may hold, as far as relates to the Defence of the Mayor himself, in Case of his being put to justify his own Conduct.

But the *present* Case is *not* the Case of the Mayor himself: It is on a *collateral* Question, and concerns a *THIRD Person*, to whom the Indorsment made by the Mayor is *immaterial*.

The Clause in the Act of 7 & 8 W. 3. c. 25†. inflicts a *Penalty* on the Mayor's *omitting* to indorse the Day of receiving the Precept: And it is material to *Him*. But this *third* Person can

not know *when* it was indorsed, *how* it was indorsed, or *when* it was *attested*. Therefore *this Difficulty* of proving these Circumstances *ought not* to be laid on a *third Person*.

A Proof of the Corporation's Right to choose Members; and of the Precept's *issuing*, as declared upon; and of the Delivery of it to the Returning Officer; and of the going to an Election thereupon; might be enough for the Plaintiff in this Action, to make: And it does not appear that he would have been deficient in making all proper Proof. But all *further* Proof that he could have made, was *stopt* by this Opinion of the Judge holding the Necessity of proving this Delivery of the Precept to the Mayor, *BY the instrumental Witnesses who attested the Delivery*, or by One of them.

Therefore WE are ALL of Opinion, that the Nonsuit was too early in the Cause; and that there ought to be a new Trial.

RULE for new Trial made ABSOLUTE.

On the *Monday* the 28th of *November* 1768, Lord *Mansfield* said that Mr. Justice *Bathurst* apprehended that the Court had mistaken his Report.

Therefore let the Rule be enlarged till the next Term; that we may have Mr. Justice *Bathurst's* additional Report.

His Lordship intimated to Mr. *Cole*, of Counsel for the Plaintiff, to wait upon Mr. Justice *Bathurst*, and refresh his Memory; if there was any Doubt about the Facts that happened at the Trial.

RULE ENLARGED.

Mr. *Cole* now reported from Mr. Justice *Bathurst*, "that he was satisfied."

Whereupon—

LORD MANSFIELD—The Consequence of that is, "that the *former* Rule must stand."

Mayor

Mayor of Norwich *versus* Berry, One, &c.

Friday 27th
Jan. 1769.

THE Judgment in this Case was pronounced in *Trinity* Term 1767: [*v. ante*, p. 2109. 2116.] The Defendant died in *October* 1767.

Mr. *Ashurst*, had obtained a Rule for the Plaintiff to shew Cause why the Judgment should not be entered up as of *Trinity* Term 1767, the Time when it was pronounced. (See 6 *Mod.* 59, 60. Lord *Mobun's* Case, and the same Book 191. *Hodges v. Templar.*)

Mr. *Wallace* was for the Plaintiff, and opposed the Rule.

But the COURT thought it a very reasonable One: And Lord *Mansfield* mentioned the Case of *Tooker v. Duke of Beaufort*, *Hil.* 30 *G.* 2. (which see in *Vol.* 1. p. 147, 148.)

RULE made ABSOLUTE.

Vide 17 *C.* 2. c. 8. and 8 & 9 *W.* 3. c. 11. The former (sect. 1.) relates to the Death of either Party between Verdict and Judgment: The latter (sect. 6.) relates to the Death of either Party after an interlocutory Judgment and before final Judgment.

Rex *versus* Nathaniel Dawes, Esq. Mayor of Winchelsea.

Wednesday,
1st February
1769.

SIR *Fletcher Norton* had moved (on *Tuesday* 22d *November* 1768,) to set aside a Judgment of *Ouster*, which had been then lately signed against the Defendant in this Cause, by Default.

He did *not* move it on *behalf* of the Defendant; but upon the Foot of his *Collusion* with the Prosecutor.

Sir *Fletcher's* Clients, on whose behalf he made this Motion, were Eight Corporators, whose Rights were dependant upon the Right of *Dawes* to be Mayor; which Right of his they therefore desired to defend.

Mr. *Dawes* had gone through his Office of Mayor, without any Impeachment, till this Information in Nature of a *Quo War-*
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ranto was brought against him. He refused to defend it, and insisted upon suffering Judgment to go against him by Default; although an unexceptionable Indemnification was offered to him from these Persons whose Corporate Rights depended upon his having a Right to the Office of Mayor.

Sir *Fletcher* produced Affidavits to prove that the Mayor neither had been nor was to be at any Expence in defending his Right to the Mayoralty: Notwithstanding which, he had discharged his Attorney from acting any further on his behalf, under a Pretence that being now doubtful about the Validity of his Title to the Office of Mayor, he had determined not to be at any *further* Expence in defending it; though, in Fact, he never had been at any Expence at all, but his Expences had been undertaken to be paid, and some of them actually paid by other Persons. Immediate Notice was thereupon given to Mr. *Dawes*, "that he should be *indemnified* from all Charges and Expences which he might incur by making his Defence:" Which he nevertheless refused, and suffered this Judgment of *Ouster* to be signed against him, for Want of it.

Sir *Fletcher Norton* now offered to give him any Indemnification against any Expence attending his carrying on his Defence.

The COURT thought the Motion reasonable; and made a RULE upon both the Prosecutor and the Defendant *Dawes*, for them to shew Cause why the Judgment of *Ouster* signed against the Defendant should not be set aside; and also why *Thomas Orby Hunter*, Esq. a Freeman of the ancient Town of *Winchelsea* should not be admitted to defend, in the Name of and for the said Defendant; he the said *Thomas Orby Hunter* indemnifying the said Defendant from all Costs and Charges attending such Defence or occasioned thereby.

UPON shewing Cause against this Rule, many Facts were disputed; and, particularly, "whether Mr. *Dawes* had given up his Claim *collusively*, or not." But it appeared sufficiently, upon the Whole, That the Rights of these Corporators, whose Corporate Rights turned upon the Validity or Invalidity of Mr. *Dawes's* Title to the Mayoralty, during which they were elected into their Offices, would be greatly affected by the Support or Desertion of his Title to the Office of Mayor.

This Matter bore a long and warm Litigation: After which, and upon all the Circumstances of the Case,

The whole COURT were clear, that the Corporation had such an Interest in the Mayor's Title to his Office, and such a Connexion

Connexion with it, and such a Right to see it supported, if it was really a good One, that he ought not (as an honest Man, or as a just Corporator,) to desert and give it up, in prejudice to the Rights of the Corporation in general, or of particular Corporators, when he was offered a complete indisputable Indemnification on the Part of those who desired to defend his Right in order to support their own. Under these Circumstances, they held that it was not in his Power to give it up.

They did not indeed think him obliged to maintain his own Right at his *own Expence*, merely to support the Rights of those who claimed under it; if he either really thought his Title unsupportable, or found that the maintaining of it would be too expensive for him to bear: But they were very clear, that he ought not to be permitted to desert it, either *collusively* or *voluntarily*, when those whose Rights depended upon it were desirous of maintaining it, *without any Charge or Expence to him*. Therefore,

Per CUR'. unanimously—

RULE made ABSOLUTE.

Rex versus Uriah Corden.

Saturday 4th
Feb. 1769.

THIS was a Conviction by a Justice of Peace, upon the third Section of the Act of 5 G. 3. c. 14. “for the more effectual Preservation of Fish in Fishponds and other Waters.”

It set forth that on a specified Day, at a specified Place, *Martha Buxton* of the Parish of *Ashborne* in the County of *Derby* Spinster cometh in her own proper Person before the Justice, and upon her Corporal Oath &c &c giveth me the said Justice to understand and be informed that *Uriah Corden* of *Clifton* in the Parish of *Ashborne* in the said County Gentleman, on the 18th Day of *June* last past, in the Parish of *Ashborne* aforesaid, did fish with a Net in a Brook or Stream called the *Schoo Brook*, in that Part of the said Brook which runneth between the Manor of *Clifton* and the Manor of *Offcoat* and *Underwood* in the said County; and did then and there take kill and destroy several Fish, against the Form of the Statute in such Case made and provided; he the said *Uriah Corden* * not having any just Right or Claim to take kill or carry away any such Fish; and the said Part of the said Brook or Stream wherein and whereupon the said Fish were so taken killed and carried away not being in any Park or Paddock, or in any Garden Orchard or Yard adjoining or belonging to any Dwelling-house, but in other inclosed Ground then

* See the Proviso in the 6th Section of this Act.

then and there being private Property. And further, on the same Day and Year aforesaid, and at the Place aforesaid, cometh One *John Chatterton* of *Ashborne* aforesaid Gentleman, and giveth me the said Justice to understand that *Richard Hayne* of *Ashborne* aforesaid Esq. is the true and lawful Owner of the Fishery of the aforesaid Part of the said Brook called *Schoo Brook* which runneth between the Manor of *Clifton* and the Manor of *Offcoate* and *Underwood* in the County aforesaid. And thereupon the said *Martha Buxton*, the Informant aforesaid, prays that the said *Uriah Corden* may be convicted of the Offence aforesaid, according to the Form of the Statute in such Case lately made and provided. WHEREUPON, afterwards, to wit upon the 16th Day of *July* in the Year aforesaid, at *Ashborne* aforesaid in the County aforesaid, he the said *Uriah Corden* being by Virtue of my Warrant brought before me the Justice aforesaid at *Ashborne* aforesaid to answer the said Charge contained in the said Information, and having heard the same, he the said *Uriah Corden* is asked by me the said Justice "If he can say any Thing for himself why he the said *Uriah Corden* should not be convicted of the Premises above charged upon him in Form aforesaid:" And because he the said *Uriah Corden* doth not nor can say any Thing in his own Defence touching and concerning the Premises aforesaid, but doth of his own Accord freely and voluntarily acknowledge and confess all and singular the said Premises to be true, in Manner and Form as the same are charged upon him in the said Information; and because, all and singular the Premises being heard and fully understood by me the said Justice, it manifestly appears to me that he the said *Uriah Corden* is guilty of the abovementioned Offence so laid to his Charge; it is therefore ADJUDGED by me the said Justice, that the said *Uriah Corden* is GUILTY of the aforesaid Offence; and that he be, and he is hereby CONVICTED by me the Justice aforesaid, of the Premises aforesaid, according to the Form of the Statute aforesaid; and I the Justice aforesaid do award and adjudge, that for the Premises aforesaid he HATH FORFEITED the Sum of Five Pounds of lawful Money of *Great Britain*, to be paid as the Statute aforesaid doth direct. IN WITNESS whereof, I the said Justice to this present Record of Conviction as aforesaid have set my Hand and Seal, at *Ashborne*, aforesaid in the County aforesaid, the 16th Day of *July* in the Year above-written.

RICHARD BERESFORD (L. S.)

This Case was twice argued by Counsel on both Sides.

The Counsel for the Defendant took Three Exceptions to the Conviction.

1st. Exception.

1st Exception. It don't appear that this Conviction was made *upon the Complaint of the Owner*, or by Authority from the Owner; or even that this was a Fishing *without the Consent* of the Owner. Whereas it appears clearly, upon considering this whole Act of Parliament, and comparing one Part of it with another, that the Complaint of the Owner is essentially necessary to the Jurisdiction given to the Justice of Peace by this third Clause of it. See the Case of *The King against Mallinson*, M. 32 G. 2. B. R. *ante*, p. 681, 682.

2d Exception. There is no Proof *upon Oath*, that Mr. Hayne was the Owner; or who else was so. *John Chatterton's* Information is not upon Oath: And it is confined to the Time of giving it; but says nothing about who was Owner at the Time of the Fishing.

3d Exception. The Adjudication is "that the Defendant hath forfeited the Sum of Five Pounds, *to be paid as the Statute aforesaid doth direct*." Whereas it ought to have particularly specified and directed *to whom* it should be paid.

It was answered to these Exceptions—

1st. There are no Expressions in this Act of 5 G. 3. c. 14. which require the Complaint to the Justice to be made *by the Owner*. The Words are *general*: The Jurisdiction is given to the Justice, "*upon Complaint made to him upon Oath*."

2d. The Defendant has *confessed* the whole Charge: And Part of it is, "that Mr. Hayne was the Owner."

3d. The Act itself directs "that the Party convicted shall immediately after Conviction pay the Penalty of Five Pounds to such Justice or Justices before whom he shall be convicted, for the Use of such Person or Persons as the same is thereby appointed to be forfeited and paid unto." It is enough, to say "*convictus est, et forisfaciet the Sum of Money juxta formam Statuti*." 1 Salk. 383. *Regina v. Barrett*. 2 Sir J. Strange 858. *Rex v. Hawks*.

The COURT All concurred in holding this Conviction to be a *bad One*. They thought that a * tight Hand ought to be holden over these summary Convictions; and it ought to appear to the Court, that the Justice has Jurisdiction in the Case: They ought to be kept to a proper Degree of * Strictness; and not to be made arbitrarily and without Authority. In the present Case, they held that the Justice does not appear to have Jurisdiction.

tion. Here is no Complaint from the *Owner*; nor does it even appear to have been without his *Consent*. It ought, at least, to appear that it was *without his Consent*. This is plainly implied in the Act of Parliament: The giving the Penalty to the Owner shews it. Here, it does not sufficiently appear that this was *private Property*; or *who* was the Owner. The Witness who gives the Justice to understand "that Mr. *Hayne* is the Owner," was *not upon Oath*; and was therefore no Witness. The Ownership is not sufficiently charged: Neither is it confessed. The Confession goes no further than the Matters charged. The Words in the Conviction, "not having any just Right or Claim to take "kill or carry away any such Fish," are the Words and Opinion of *Martha Buxton*; not of the Justice of Peace who has made the Conviction: And they are too General. The Proviso from whence they are taken, means to except such Persons as have a special Right to fish in the Fishery of another. The Offence intended in this Conviction is fishing in the Fishery of Mr. *Hayne*, being private Property. But all this might be done, for aught that appears upon this Conviction, with the *Consent* of the Owner. The Fact ought to appear so that the Court may be able to judge whether the Conviction be agreeable to Law. If the Owner had been the Complainer, that would have shewn his Dissent: But this Conviction is upon the Complaint of *Martha Buxton*; and it does not appear that the Defendant has been guilty of fishing in any Water being private Property, *without Consent* of the Owner.

Per CUR'. unanimously—

CONVICTION QUASHED.

Rex versus John Fletcher.

Rex versus Willam Gould.

These were Two Convictions exactly like the last above, against *Uriah Corden*.

CONVICTIONS QUASHED.

Tonna,

Tonra, surviving Assignee of Hitchcock and Edwards, Monday 6th
Feb. 1769.
versus Adam Edwards,

MR. Cox moved, on behalf of the Defendant, that he might be discharged on filing *Common Bail*. He moved it upon the Foot of the Plaintiff's Affidavit being insufficient to hold him to special Bail; for Want of being positive enough, as to the Existence of the Debt: For, that the Plaintiff had only sworn "that the Defendant was indebted to him in the Sum therein mentioned, AS APPEARS *by the Bankrupt's Books*, and "as the Plaintiff verily believes."

Mr. Cox said, there was a Difference between the Case of Executors or Administrators and the Case of an Assignee under a Commission of Bankruptcy. The Latter might procure stronger Evidence than the Former: The Assignee might procure a positive Affidavit from the Bankrupt himself. An Assignee therefore ought to go further than merely swearing to the Bankrupt's Books and his own Belief.

Lord MANSFIELD answered, that it was not reasonable to put it upon the Assignee, to procure an Affidavit from the Bankrupt: The Bankrupt might perhaps refuse to make such an Affidavit. Besides, it has been solemnly settled "that such an Affidavit as this, is sufficient." It is as certain as the Nature of the Thing will bear. In a Case between *Barclay and Others, Assignees of Styles and Styles*, against *Hunt*, in *Michaelmas Term 1766*, we took Time to look into the Cases and consider: And I gave the Resolution of the Court. [See this Case and Resolution, *ante*, p. 1992, to 1996. *M. 7 G. 3.*]

The whole COURT agreed it to be a settled Point, "that swearing to Belief, in this Manner, was sufficient for an Executor or Administrator, or an Assignee under a Commission of Bankruptcy."

MOTION DENIED.

Sutton *versus* Bishop.

THIS was an Action of Debt brought against *Bishop*, for the 500*l.* Penalty, upon the 7th Clause of the Statute of 2 G. 2. c. 24. "for the more effectual preventing Bribery and Corruption in the Election of Members to serve in Parlia-
ment:"

“ment:” To which Action the Defendant had pleaded “*Nil debet* ;” and a Verdict had been obtained against him by the Plaintiff, at the last *Reading-Affizes* ; but not fairly and regularly, as the Defendant alledged ; who therefore moved to set it aside.

This Case was particularly circumstanced, long debated, and largely discussed : But the short Substance of it was no more than this—

The Defendant *Bishop* received a Bribe of Five Guineas from One *James Earle*. He determined to discover *Earle*, in order to indemnify Himself, pursuant to the 7th Clause of this Statute, whereby it is enacted “that if any Person offending against this Act, within the Space of Twelve Months next after such Election as aforesaid, discover any other Person or Persons offending against this Act, so that such Person or Persons so discovered be thereupon convicted, such Person so discovering, and not having been before that Time convicted of any Offence against this Act, shall be indemnified and discharged from all Penalties and Disabilities which he shall then have incurred by any Offence against this Act.” Accordingly, the now Defendant *Bishop* made this Discovery of *Earle*, upon the very Day of the Transaction, to Mr. *Gray*, an Attorney, who was a Commissioner to take Affidavits ; and at the same Time made an Affidavit of the Fact, before Mr. *Gray*. This was done upon the 16th of *March* : And an Action was thereupon brought by One *Bingley* against this *James Earle*. The Writ against *Earle*, at the Suit of *Bingley*, was served upon *Earle* within Three Days, viz. on the 19th of *March*. Two Months after this, the present Action was brought by the present Plaintiff *Sutton*, against *Bishop*, the Receiver of the Bribe, who had Two Months before made the abovementioned Discovery. The Process against *Bishop*, at the Suit of *Sutton* was served upon *Bishop*, on the 18th of *May*. Both these Causes (of *Bingley v. Earle*, and *Sutton v. Bishop*) were set down for Trial on the same Day ; and were actually tried within half an Hour of each other : But the Cause of *Sutton v. Bishop* standing first, and as first entered, upon the Judge’s Paper of Causes, he would not invert the Order in which they stood upon his Paper, by trying the other Cause (of *Bingley v. Earle*) first, though that Action was first commenced. The Consequence was, that *Sutton* got a Verdict against *Bishop* : For, *Bishop* could not shew that he had made a Discovery of another Person so as to be thereupon convicted. *Bingley*, on the other Hand, got a Verdict against *Earle*, upon the Evidence of *Bishop*. But this Verdict came too late to avail *Bishop* in his own Cause at the Suit of *Sutton* : For, a Verdict had already been given against him ; which, as his Counsel insisted, could not have happened, if his Cause had been tried first, as it ought to have been.

In the Debate of this Matter, (upon Tuesday 24th January 1769,) Two Questions arose :

1st. Whether the Defendant *Bishop* was intitled to avail himself of the Protection of this seventh Clause of the Act above recited ;

2d. In *what Mode* he could avail himself of it ; supposing him intitled to it.

The Counsel for the Plaintiff *Sutton* argued, that *Bishop* was not intitled to the Protection of this Clause. They said, he was only a *Witness* in the Cause ; not Plaintiff: *Bingley*, the Plaintiff in the Action, was the Discoverer ; and the only One who could take Benefit of this Provision in the Act. Besides, he can never be esteemed a *complete* Discoverer : He had not prosecuted up to *Conviction*, when the Verdict passed against him. At *that Time*, there was no Verdict, much less any Judgment, against *Earle* : It is the Judgment, that renders it properly a Conviction. A subsequent Prosecution of *Earle* could not avail *Bishop*. If a Verdict alone is to be considered as a Conviction, and if a Witness may be esteemed a Discoverer, yet this Defendant *Bishop* would not be intitled to this Indemnification and Discharge, *by giving his Evidence*. For, the Clause says, “ The Person discovering, not having been *before that Time convicted* of any Offence against the Act :” Whereas this Witness was convicted of such an Offence *before the Time* of giving his Evidence.

The Counsel for the Defendant *Bishop* argued, that their Client was undoubtedly such a Discoverer as the Act meant to protect ; that a Witness may be considered as a Discoverer, and more properly than the Plaintiff in the Action ; that a Verdict against the Person discovered, is a sufficient Conviction of him within the Intention of this Clause ; that the Words “ not having been *before that Time convicted*” manifestly refer to the Time of the *original Discovery*, when first made, and not to the Time of giving Evidence at the Trial ; and that the Judge ought to have tried that Cause of *Bingley v. Earle* first, and then Evidence might have been given of the Verdict against *Earle*, upon the “ *Nil debet*” pleaded in this Cause. The Defendant *Bishop* was clearly, they said, intitled to the Benefit of this Provision ; and therefore he ought to have Liberty to avail himself of it in some Mode or other ; either by setting aside their Verdict and granting a new Trial, or by staying the *Postea*, or arresting the Judgment, or at least by an *Auditá Querela*.

The COURT took some Days to consider.

*N. B. Lord Mansfield did not interfere in this; not having been present at the Argument of it.

And on *Monday 6th February 1769*, they delivered their Opinion*.

They held, that in this Case, the Defendant *Bishop* was to be deemed the Discoverer. His Application to Mr. *Gray* and making an Affidavit of the Fact was the first and original Discovery. The Action was brought thereupon against *Earle*: And *Earle* was convicted, upon the Evidence of *Bishop*. The other Witnesses were only Supporters of his Discovery. The Clause in Question speaks of the Discoverer, in the singular Number. The Prosecutor could not be Evidence for himself. If no One but the Prosecutor could be considered as the Discoverer, the Clause would be ineffectual.

They held, that the Words "such Person so discovering, and "not having been before *that Time* convicted of any Offence "against this Act" clearly relate to the *Time of the original Discovery*: And therefore *Bishop's* having been himself convicted before he gave Evidence against *Earle* in the Cause last tried, is no Objection at all. The Grammar of the Sentence requires this Construction. The original Discovery is the true Merit. If the Offender substitutes another in his Place, so as to be convicted, that intitles him to be himself indemnified and discharged. If another Person institutes a Prosecution grounded upon such Discovery, the Discoverer is only a Witness in that Cause; he has no Power over the Conduct of it: But when a Conviction of the Person discovered is obtained, the End is then answered, and the Discovery is then rendered complete and perfect.

It was made a Question, in the Argument of this Case, "What shall amount to a Conviction, within the Sense of this "Clause?" It was said "that a *Verdict alone* was not a Conviction." And they held, that in *civil* Actions, a Verdict is nothing without a Judgment. This is a civil Action; an Action of Debt for a Penalty: "*Nil debet*" is pleaded. The Defendant is not convicted of the Debt, till Judgment. Therefore they were of Opinion, that it ought to be *completed by a Judgment*. But they were also of Opinion, that after it should be so completed, it would *relate back* to the Time of the original Discovery. And they thought that *Bingley* ought to be at Liberty to enter up his Judgment; in order to intitle *Bishop* to his Indemnity, or at least not to strip him of it. They thought also that *Sutton* should complete his Judgment; but that his Proceeding upon it should be stayed.

They

They thought, upon the Whole, that *Bishop* was intitled to some Relief: But in *what Mode* he should receive it, was not easy to determine. The Verdict obtained against him could not be set aside for *Irregularity*; because it was *not* irregular. There was no Pretence to *arrest the Judgment*; because nothing appears upon the Face of the Record, to justify it: And the Court ought not to arrest Judgments upon Matters not appearing upon the Face of the Record; but are to judge upon the Record itself, that their Successors may know the Grounds of their Judgment. An *Auditá Querela*, it was agreed, would be a proper Method; and the most unexceptionable One, and was the old legal Remedy: But as it had been long disused and would be expensive, they chose to do it, if it might be so done, in a *summary* Way, as being more easy and less expensive. At length, they were of Opinion, that it might be done by a *special Rule*, particularizing the Circumstances of the Case, and upon their staying the Execution of *Sutton's* Judgment against *Bishop*. This Rule, they said, would be a Record of the Court: And the special Reasons of making it would appear in it, and be upon Record.

For the present, They discharged a Rule at this Time subsisting, "for staying the *entering up* the Judgments in the respective "Cross-Causes:" But they made a Rule "that all *Proceedings* "upon both these Judgments should be *stayed till further Order*." And they proposed to make, afterwards, a special Rule to the Effect that has been abovementioned.

Rex *versus* John Rowe.

Wednesday
8th February
1769.

THIS was a Case reserved at the last *Essex*-Assizes, upon the Trial of an Information in Nature of a *Quo Warranto*. It was as follows: *Viz.*

This was an Information in the Nature of a *Quo Warranto* against the Defendant, to shew by what Authority he claims to be One of the Freemen or Sworn Burgesses of the Borough of *Colchester* in *Essex*: To which, the Defendant pleaded specially; and the King's Coroner having replied and denied the Allegations contained in the Plea; the following Issues were joined upon the Record; *viz.*

1st. That within the said Borough of *Colchester* there is not, nor at the Time of exhibiting the Information was not, nor during all the Time aforesaid whereof the Memory of Man is not to the contrary hath there been, a certain ancient and laudable Custom there

there used and approved, that is to say, " That every Person who
 " had served an *Apprenticeship by Indenture*, for the Term of *Seven Years*, to any FREEMAN or Sworn Burgefs of the faid Borough, hath been admitted and sworn, or hath used and been
 " accustomed, nor of Right ought to be admitted and sworn (in
 " Case he hath thought fit to make Application for that Purpose)
 " into the Office of a Freeman or Sworn Burgefs of the faid Borough, to exercise the faid Office for and during his natural
 " Life."

2d. That the Defendant *did not* in due Manner SERVE an Apprenticeship for the Term of *Seven Years unto one John Steward* otherwise *Stuart*, of *Colchester* aforesaid, Bay and Say Weaver.

3d. That the Defendant *was not* in due Manner BOUND an Apprentice to the faid *John Steward* otherwise *Stuart*, by *Indenture*, FOR AND DURING *the said Term*.

4th. That the faid *John Steward* otherwise *Stuart*, at the Time when the faid Defendant was so supposed to be bound an Apprentice to the faid *John Steward* otherwise *Stuart*, and during the whole Time of his faid Service, *was not One of the Freemen* or Sworn Burgeffes of the faid Borough.

5th. That the Defendant *did not become duly intitled* to be admitted into the faid Office of a Freeman or Sworn Burgefs of the faid Borough.

6th. That the Defendant *did not in due Manner take his Corporal Oath* for the due Execution of the faid Office of a Freeman or Sworn Burgefs of the faid Borough.

7th. That the Defendant *was not duly admitted* into the Office of a Freeman or Sworn Burgefs of the faid Borough.

8th. That the faid Defendant *was not nor is a Freeman* or Sworn Burgefs of the faid Borough.—*Prout* a Copy of the Pleadings.

The CUSTOM set forth in the Defendant's Plea was ADMITTED. And it appeared in Evidence, that at or before the Feast of *St. Michael the Archangel 1731*, the Defendant went to live with *John Steward* otherwise *Stuart* in the Pleadings mentioned, UPON LIKING, *in order to his being bound an Apprentice*, and continued to live with and serve his faid Master in that Manner, until the 24th of July 1732; WHEN he was bound an Apprentice to the faid *John Steward* otherwise *Stuart*, by *Indenture*, for the Term of Seven Years, to commence from the Feast of *St. Michael the Archangel*

Archangel 1731:—Prout the Indenture. That the said Defendant continued to live with and serve the said John Steward otherwise Stuart, AS an Apprentice, under the said Indenture, FROM the said 24th of July 1732, until within about a Year and an half of the End of the Term in the said Indenture mentioned; when an INDORSMENT was made on the said Indenture, in the following Words—“ I John Steuward let John Rowe to John Finch, for the Reasidue of his Time; to find him of all nefasary Things, during his Time, and at the End his Comings.” Signed “ John Finch, John Steward;” and witnessed “ John Clay;” but not dated. That the said John Finch was NOT a Freeman of the said Borough of Colchester. That from the Time of making the said Indorsment, and in Pursuance thereof, the said Defendant lived with and served the said JOHN FINCH, for the Remainder of the said Term in the said Indenture mentioned.

The CORPORATION-BOOKS were produced; and several Entries in the same read, of the Indentures of Apprenticeship of Joseph Godfrey, William Cook, Jacob Foliard, John Woodroffe, George May, George Bull, Robert Brown, and Abraham Bowers; and also the Entries of the said Persons having been admitted and sworn Burgeses of the said Borough.—Prout a Copy of the said Entries.

AND upon this, the Jury found a Verdict for the Defendant, on the first and fourth Issues; and for the King, upon all the other Issues; subject to the Opinion of the Court on the following Question—

“ WHETHER the Binding by Indenture, and Service for Seven Years, in the Manner before stated, are SUFFICIENT to intitle the Defendant to be admitted and sworn a Free Burges of the said Borough of Colchester, under the CUSTOM set forth in the Pleadings.”

And if the Court shall be of Opinion “ that the Defendant was intitled,” then a Verdict is to be entered for the Defendant upon all the Issues:

But if the Court shall be of Opinion “ that the Defendant was not intitled,” then a Verdict shall be entered for the Defendant upon the first and fourth Issues only, and for the King upon all the other Issues.

JOHN MORTON, for Defendant.

RICHARD LEIGH.

After this Case had been twice argued at the Bar, and discussed on the Bench,

The COURT thought that it ought to have been left to the Jury: But as it now stood, they were of Opinion that there should be a Repleader; and conceived that setting aside the Verdict, and granting a new Trial, with Liberty to amend the Pleadings, would be the best Method they could now put it into. Accordingly, they made the following Rule.

Verdict set aside, and a new Trial ordered, with Liberty for the Defendant to amend his Plea; upon Payment of Costs by the Defendant to the Prosecutor.

Thursday 9th Feb. 1769. Rex *versus* Guardians of the Poor of the City of Canterbury.

SERJEANT *Leigh* shewed Cause why a MANDAMUS should not Issue, directed to them, commanding them to *assess* every Inhabitant, Parson, Vicar, and Others, and every Occupier of Lands, Tenements, Tithes impropriate, and Propriation of Tithes, in the said City and the Parishes thereof, *in EQUAL Proportion*; for the Maintenance of the Poor in the said City and the Parishes thereof. [*Vide. 1 Geo. 2. stat. 2. c. 20. sect. 20.*]

Mr. *Robinson*, Mr. *Ladd*, and Mr. *Newman* were of the same Side.

Mr. *Dunning* (Solicitor-General) Sir *Fletcher Norton*, and Mr. *Eenfon* were of the other Side.

This Corporation for maintaining the Poor within the City of *Canterbury* was established by 1 G. 2. *stat. 2 c. 20.* by the Name of "Guardians of the Poor of the City of *Canterbury*." This is a public Act: And by the 36th Section, any Person aggrieved by any Rate may appeal to the next Quarter-Sessions. The last Rate was made in *November*: And, though a Sessions had been holden since, it had not been appealed from.

AGAINST the Mandamus, it was said—That there is a Rate already subsisting, made in the same Manner as these Rates have usually been made ever since the Year 1730. That the Clergymen in *Canterbury* are the Persons who apply for this Mandamus, upon an Apprehension of two Grievances; One, "that they
" *Themselves are over-rated*;" the Other, "that other Persons
" *are*

“are not rated enough:” But their Affidavit only says “that there *are Persons* in the City, who have personal Estate and “Stock in Trade;” *without specifying* any particular Persons; and “that there are *many* of the Inhabitants there, who carry on “considerable Business there,” without naming any particular Inhabitants or Species of Business.

But *personal Estate* and *Stock in Trade* are NOT RATEABLE to the Poor-Tax, by or under the 43 *Eliz. c. 2.* nor can they be rated to it at all. The present Rate is a fair and equal Rate, and not yet expended.

Personal Estate is not generally rated to the Poor, throughout the Kingdom; and very seldom to the Land-Tax, unless upon a Re-assessment: And it is very difficult, or indeed scarce possible to rate it. In the Case of *The King* against *The Inhabitants of Shalfleet*, *Sherrington's Case*, *H. 7 G. 3**. A Superintendent of Salt-works was holden not rateable on Account of his Salary.

* See it ante, p. 2011 to 2015.

Stock in Trade can not be rated. Lessees of Lead-mines are not, in that respect, liable to be rated to the Relief of the Poor: *Governor and Company for smelting Lead &c. v. Richardson and Others*, *M. 3 G. 3.* (which *vid. ante*, p. 1341 to 1345.) A Farmer is not rateable to the Poor, for his Stock: *Queen v. Inhabitants of Barkin*. 2 *Lord Raym.* 1280. It is there indeed said “that a Tradesman is rateable for his Stock in Trade:” But that was not the Point before the Court†.

† And it has been since determined otherwise, in the Case of *The King v. The Churchwardens and Overseers of Ringwood*, 28 June 1775: Which *vide post*, p.

It is true, that it should seem by the Case of *Shoreditch Parish*, in *Carthew* 464, *Mich. 10 W. 3.* “that personal Estates were “then thought liable to be rated to the Relief of the Poor.” But the Practice has been contrary since: And probably the old Notion was deserted from its being found impracticable. At least, the personal Estate mentioned in that Case must be understood to have been liquidated *ascertained* personal Property.

As they have another subsisting Remedy, an Appeal to the Quarter-Sessions, the Court will not interfere by granting them a *Mandamus*. It was holden in *Dr. Butler's Case v. Cobbet*, *Cases Temp. Qu. Ann.* p. 254. “that a *Mandamus* is not a proper Remedy for an unequal Taxation: But the proper Remedy is by “*Appeal*.” And in the Case of *The King* and *the Churchwardens of Weobly*, in 2 *Str.* 1269, the Court refused to grant a *Mandamus* directing the Insertion of particular Persons in the Poor's Rate: For that the Remedy was by *Appeal*; and this Court never went further than to oblige the making a Rate, without meddling with the Question “who is to be put in or left out;” of which

which the Parish-Officers are the proper Judges, subject to an Appeal.

IN SUPPORT of the Rule, it was said—That the Sessions had refused to state the Matter specially: And therefore this Court would not preclude the Persons aggrieved, from this only remaining Method of Redress, by Mandamus. This Court will always take Care to see that delegated Powers are properly executed. If this really is a good Rate, it will appear so upon a Return to our Mandamus; and will be established as such. It is true, that this Court will not enter into the *Quantum* of the Rate and the exact Equality and Proportions of it amongst the several Individuals that are rated. But they will not permit the Omission of a *whole Class* of Persons who ought to have been rated. Now we have sworn and proved “that there are several
“ Persons in the Place, who have personal Property and who
“ have Stock in Trade there, and yet are omitted out of this
“ Rate.” They say, indeed, “that such a Sort of Property is
“ *not rateable* at all.” But this is the very Question upon which we desire the Decision of the Court. We say that it *is* rateable; that it has been *always understood* to be rateable; that it actually *is and has been* rated, in many Places; that the Decisions in this Court have been “that it *ought* to be rated;” that the Cases they cite are no Authorities to the contrary; that many Persons vote for Members of Parliament (in Scot and Lot Boroughs) on Account of their being rated for their personal Property. We object to the Rate as being *radically wrong*: They ought to have rated *all Sorts* of rateable Property. On the contrary, they have left out one Part of the Property made rateable by the Statute. The Legislature have delegated the Power of providing for the Poor of the City of *Canterbury* in the precise Words of the 43 *Eliz. c. 2*. And our Rule is in the same Words with both. Every Inhabitant ought to be rated according to the visible Estate, both real and personal, which he has in the Place. 2 *Bulstrode* 354. And we say, that as we are rated for our Tithes, it is but just and equal that all other visible Estate, all other rateable Property, ought to have been rated likewise. In the Case of *Barkin*, 2 *Lord Raym.* 1280, 1281, the Rule is express “that a Trades-
“ man *is* taxable to the Poor-Rates, *for his Stock in Trade*.” And in the *Shoreditch* Case, the Sessions quashed the second Rate, because, though the personal Estates were named in it as well as the real, yet the personal Estates were not charged in proper Proportion to the Lands: And the Sessions-Order was confirmed by this Court. *Cartbew* 464.

But supposing it to be doubtful, that alone would be a sufficient Reason for granting a Mandamus. Let them return “that
“ it is not rateable:” And we will controvert their Return. We
have

have a proper Ground for praying a Mandamus: We do not complain of any Thing that is merely Ground for an Appeal. If they had rated personal Property only, and omitted Land; should not a Mandamus have gone? And there is just as much Reason for it, when they have rated Land, omitting personal Property.

The Case of the Lessees of Lead-Mines was determined, they said, upon this Ground, "that the Poor are to be supported by *certain*, not by *casual and uncertain* Funds." [*V. ante*, 1343.] But the same Reason holds for rating personal Property to the Poor's Tax, as to the Land Tax.

Lord MANFIELD happened to be absent.

Mr. Justice YATES said that the general Question aimed at in the Argument of this Case does not seem to have been decisively determined: And if it were necessary for the Court to determine upon that Question now, he should desire to consider about it. But he did not think it necessary to determine that Point now; because there were sufficient Reasons, exclusive of it, against making the present Rule absolute. The Court can't issue a Mandamus "to make an *equal* Rate:" It is within the Jurisdiction of the Justices of the Peace, to judge whether a Rate is equal, or whether proper Persons are put into it. If it be unequal, or if Persons who ought to be inserted are omitted, it is Matter of Appeal, and within the Jurisdiction of the Sessions. But the present Application is made to this Court *per Saltum*: This Rate was made in November; a Quarter-Sessions has been holden since; and no Appeal made to it, from the Rate. Besides, it does not appear that the personal Estate and Stock in Trade are clear liquidated ascertained personal Estate and Stock in Trade. So that there was not, in his Opinion, a proper Foundation laid for granting this Rule.

Mr. Justice ASTON agreed with Mr. Justice Yates, that the Persons who complain of this Rate have done wrong, in coming to this Court *per Saltum*, without appealing to the Sessions.

He observed, that it was odd that ever since the Case in *Bulstrode* (which was above 140 Years ago,) the Rule said to be then settled should never have been carried into Execution, nor any Determination made in Pursuance of it. He thought there was great Difficulty and Guess-Work in taxing personal Property and Stock in Trade; and that it was scarce practicable to ascertain the true *Quantum* of either. No Case decides "that it is rate-able:" And probably the Statute of 43 *Eliz.* did not intend that it should be so.

However, he declared "that he gave *no direct Opinion* upon this Point."

Mr. Justice WILLES also declared, that he should give no *obiter* Opinion about personal Property or Stock in Trade being liable to be rated. Yet he intimated that long contrary Usage ought to go a great way towards overturning any old *Dictum*; and that if they were liable, they ought at least to be visible liquidated and ascertained, not loose fluctuating and uncertain.

He agreed with Mr. Justice *Yates* and Mr. Justice *Aston*, "that the proper Method to have been taken in this Case, would have been an *Appeal* to the Sessions:" Observing, at the same Time, that by 17 G. 2. c. 38. *sect.* 4. an Appeal is given to Persons who have any Objection to any Person being put on, "or left out of the Rate."

He added, that he did not know that this Court ever granted a Mandamus "to make an *equal Rate*."

Mr. Justice *Yates* thereupon repeated, and Sir *Fletcher Norton* agreed "that the Court could not grant a Mandamus to make an *equal Rate*."

The COURT explicitly declared, that they had given *no* Opinion "Whether *personal Property* and *Stock in Trade* were or were not rateable to the Poor-Tax."

They seemed to think that the fairest Method would be, for these Guardians of the Poor to state the Matter *specially*, that the Court might have *certain* Facts to judge upon.

At present, they discharged the Rule now depending.

RULE DISCHARGED.

Note—

* Vide post,
P.

On Saturday 26th May 1770, in the Case of *The * King* against *The Inhabitants of Witney*, the Question "Whether *Stock in Trade* was liable to be rated to the Poor-Tax," was again before the Court; and Lord *Mansfield* was then present: But the Case being imperfectly stated, the Court would not give a general Opinion, upon a vague State of the Case. I hope, hereafter to communicate this Case of *Witney*, at large: It may now be seen, in Mr. *Bott's* Collection of Decisions upon the Poor-Laws, *Case* 52. pages 34, 35.

I

But

But subsequent to this *Witney-Cafe*, there was another very like it, on 28th June 1775, *Rex v. Churchwardens and Overseers of Ringwood*; in which it seems to be very nearly, if not quite settled "that a Tradesman is *not* rateable to the Poor-Tax, for his *Stock in Trade*." This Case I also hope to give some Account of, hereafter†; unless I shall find the † Vide post, Profession to be gorged with the Number of Cases that I P. have already troubled them with.

Rex versus Dr. Hay, on the Application of Lovegrove. Friday, 10th Feb. 1769.

MR. *Dunning* (Solicitor General) shewed Cause against a *Mandamus*, to be directed to the Judge of the Prerogative Court of *Canterbury*, commanding him to grant Probate of the Will of *Joseph Bidleson* Esq. deceased, to *Lovegrove*.

Mr. *Morton* had obtained this Rule, upon the First Day of the present Term; there having been a Decree of a Court of Delegates, in *Lovegrove's* Favour, and in Affirmance of the Validity of the Will: But a fresh Caveat had been entered by a fresh Party, one *Bethell*, who claimed as next of Kin to the Testator.

Mr. *Morton*, had cited *Carthew* 457. *Rex v. Sir Richard Raines*, and 1 *Salk.* 299. S. C. where the Court granted a peremptory *Mandamus* commanding the Judge of the Prerogative Court to grant Probate of a Will to an Executor; though he was become Insolvent, and absconded. He had also cited 1 *Levinz* 186. *Offley v. Best*, to shew that a *Mandamus* lies "to grant Administration according to the Statute."

Mr. *Dunning's* Cause which he shewed against granting this *Mandamus* was "that a Suit is now depending in the Spiritual Court concerning the Validity of this Will."

The COURT were unanimous, that where a Suit is depending in the Spiritual Court concerning the Validity of a Will, that Court has Jurisdiction in the Matter. And here the Validity of this Will is actually in Litigation in that Court.

And Mr. Justice *Aston* mentioned a Case in this Court, in *Hil.* 1738. 12 G. 2. *Rex v. Dr. Bettsworth*, at the Instance of *Plunkett*, (of which I have a Note;) in which it was unanimously agreed by all the Four Judges (*Lee, Page, Probyn* and *Chapple*,) "that the Pendency of a Suit in the Ecclesiastical Court concerning the Validity of a Will is a sufficient Answer to a *Mandamus* commanding the Judge to grant Probate of it:" And

And accordingly the Return in that Case, "that there was a Suit depending before him, and undetermined, concerning the Validity of the Will," was allowed to be a good Return to the Mandamus.

RULE DISCHARGED.

The End of *Hilary* Term 1769, 9 Geo. 3.

In this Vacation,

Sir *Fletcher Norton* was made Chief Justice in *Eire* of the Forests South of the *Trent*; sworn of the Privy Council; and quitted the Bar.

And

James Wallace, of the *Middle-Temple*, Esq. was appointed One of his Majesty's Counsel learned in the Law.

Easter

Easter Term

9 Geo. 3. B. R. 1769.

Sir FLETCHER NORTON came no more to the Bar; having been, since last Term, appointed Chief Justice in *Eire*, of the Forests South of *Trent*, and sworn of the Privy Council. Mr. *Wallace* was called within it.

Rex *versus* Edgar.

Rex *versus* Brickell.

Wednesday
12th April
1769.

THESE were *Cross-Information*s in Nature of *Quo Warranto*, against Two Common-Council Men of *Shrewsbury* (in opposite Interests,) to shew, respectively, by what Authority they claimed that Franchise.

Mr. Serjeant *Burland* moved to QUASH both of them; both Parties *consenting* that they should be *quashed*.

But the COURT said it was an improper Motion: They could not be *quashed* upon Motion.

Serjeant *Burland* owned, that he thought so Himself; and changed his Motion to a more proper One, *viz.* that the *Recognizances* on both Sides should be *discharged*.

And this Motion being *consented* to on both Sides,

The COURT granted it: But they directed that the Rule should be taken as a Rule *by Consent*.

Saturday 15th
April 1769.

Rex *versus* John Pratt.

MR. Cox shewed Cause against quashing an Order of Sessions made upon the 11 G. 1. c. 28. "for the better regulating of Buildings, and to prevent Mischiefs that may happen by Fire &c."

The Workmen had certified to the Sessions, pursuant to the first Clause of that Act, "that a Party-Wall of a *Stable* was defective and ruinous, and ought to be pulled down." One Mr. Beake, thinking himself aggrieved by this Certificate, complained to the Justices: And they made an Order in Favour of the Complaint and against the Certificate; which they quashed, apprehending the Act of Parliament to be *confined* to Party-Walls between Houses, and not to extend to Party-Walls between STABLES.

* N. B. The first Section of this Act concludes thus—
"and the Determinations of the said Justices shall be final and conclusive to all Parties, without any Appeal from the same."

Sir *Fletcher Norton* had moved to * quash this Order of Sessions; and called this Opinion of the Sessions a narrow Construction.

But Mr. Cox defended it; and observed that the Words of the Act were "*House and Houses*;" and that there were no Expressions in it that were at all applicable to Stables.

The COURT were of Opinion with him; and unanimously discharged Sir *Fletcher's* Rule, which he had obtained before he left the Bar, and which was now supported by Mr. *Bearcroft*.

ORDER OF SESSIONS AFFIRMED.

Monday 17th
April 1769.

Gibbon *versus* Paynton and Another.

THIS was an Action against the *Birmingham* Stage-Coachman, for 100*l.* in Money sent from *Birmingham* to *London* by his Coach, and lost. It was hid in Hay, in an old Nail-Bag. The Bag and the Hay arrived safe: But the Money was gone. The Coachman had inserted an *Advertisement* in a *Birmingham* News-Paper, with a *Nota bene*, "that the Coachman would not be answerable for Money or Jewels or other valuable Goods, unless he had Notice that it was Money or Jewels or valuable Goods that was delivered to him to be carried."

He

He had also distributed Hand-Bills, of the same Import. It was notorious in that Country, that the Price of carrying Money from *Birmingham* to *London* was Three Pence in the Pound. The Plaintiff was a Dealer at *Birmingham*; and had frequently sent Goods from thence. It was proved that he had been used, for a Year and an Half, to read the News-Paper in which this Advertisement was published; though it could not be proved that he had ever actually read or seen the individual Paper wherein it was inserted. A Letter of the Plaintiff's was also produced, from whence it manifestly appeared that he knew the Course of this Trade, and that Money was not carried from that Place to *London* at the common and ordinary Price of the Carriage of other Goods: And it likewise appeared from this Letter, that he was conscious that he could not recover, by Reason of this Concealment. The Jury found a Verdict for the Defendant.

Mr. *Wallace*, on behalf of the Plaintiff, moved (on *Thursday* 26th *January* 1769) for a new Trial, and obtained a Rule to shew Cause: Which Rule he now enforced, and was supported by Mr. *Hotbam*.

They insisted that the Coachman was answerable; though he did not know that it was Money. A Carrier is always answerable, unless he accepts the Goods *speciallly*: But the Circumstances of this Case, they said, do *not* amount to a *special* Acceptance. He made no Inquiry or Objection: Therefore he is answerable. It is incumbent upon him, to see that he is not cheated. He is bound to receive the Goods, and must run the Risk. If the Goods are lost by Negligence, or even if he is robbed, he is liable to answer for them. If the Trader deceives him, he may have an Action against the Trader, for this Deceit. In Proof of their Arguments and Assertions, they cited the following Cases.

A'cyn 93. *Kenrig v. Eggleston*. 1 *Ventr.* 238. a like Case cited by *Hale*, in delivering the Reasons of the Resolution in the Case of *Morse v. Slue*. *Coggs v. Barnard*, in 1 *Salk.* 26. 3 *Salk.* 11, 268. and *Holt* 13, 131, 528. *Cartbew* 485. *Sir Joseph Tyly et al. v. Morrice*. 2 *Showers* 81. *Bastard v. Bastard*. 1 *Stra.* 145. *Titchburne v. White*, at *Guildhall*; where Lord Chief Justice *King* held "that if a Box is delivered generally to a Carrier, and " he accepts it, he is answerable, though the Party did not tell " him there is Money in it."

Mr. *Dunning* (Solicitor-General) and Mr. *Mansfield* argued on behalf of the Defendant, against a new Trial. They treated this Conduct of the Plaintiff as a Fraud and Deception upon the Defendant. A Carrier certainly may accept *speciallly*: This Man

has

has done so. The Advertisement is explicit against being answerable for Money, without Notice. This Money was never fairly and properly intrusted to the Defendant: And a Carrier shall not be liable, where he is imposed upon; which is the present Case.

Lord MANSFIELD distinguished between the Case of a Common Carrier, and that of a Bailee. The Latter is only obliged to keep the Goods with as much Diligence and Caution as he would keep his own: But a Common Carrier, in respect of the *Premium* he is to receive, runs the Risque of them, and must make good the Loss, though it happen without any Fault in him; the Reward making him answerable for their safe Delivery.

This Action is brought against the Defendant upon the Foot of being a Common Carrier. His Warranty and Insurance is in respect of the *Reward* he is to receive: And the Reward ought to be proportionable to the Risque. If he makes a greater Warranty and Insurance, he will take greater Care, use more Caution, and be at the Expence of more Guards or other Methods of Security: And therefore he ought, in Reason and Justice, to have a greater Reward. Consequently, if the Owner of the Goods has been guilty of a Fraud upon the Carrier, such Fraud ought to excuse the Carrier. And here the Owner was guilty of a Fraud upon him: The Proof of it is over abundant. The Plaintiff is a Dealer at *Birmingham*. The Price of the Carriage of Money from thence is notorious in that Place: It is the Rule of every Carrier there. It is fairly presumed that a Man conversant in a Trade knows the Terms of it. Therefore the Jury were in the Right, in presuming that this Man knew it. The Advertisement and Hand-Bills were Circumstances proper to be left to the Jury. The Plaintiff's having been used, for a Year and an half, to read this News-Paper is a strong Circumstance for the Jury to ground a Presumption that he knew of the Advertisement. Then his own Letter strongly infers his Consciousness of his own Fraud, and that he meant to *cheat* the Carrier of his Hire. Therefore I entirely agree with the Jury in their Verdict. And if he has been guilty of a Fraud, how can he Recover? *Ex dolo malo non oritur Actio.*

As to the Cases cited—That of *Kenrig v. Eggleston*, in *Aleyn* 93, was 100*l.* in a Box delivered to a Carrier; the Plaintiff telling him only “that there was a Book and Tobacco in the Box:” and *Roll* directed that although the Plaintiff did tell him of some Things in the Box only, and not of the Money, yet he must answer for it; for, he need not tell the Carrier all the Particulars in the Box: But it must come on the Carrier's Part to make special Acceptance. But in respect of the intended Cheat to the Carrier, he told the Jury they might consider him in Damages: Notwith-

Notwithstanding which, the Jury gave 97*l.* against the Carrier, for the Money only, (the other Things being of no considerable Value,) abating 3*l.* only for Carriage. *Quod durum videbatur Circumstantibus.* Now, I own that I should have thought this a *Fraud*: And I should have agreed in Opinion with the *Circumstantibus*; which seems to have been also the Opinion of the Reporter.

So in the Case cited by *Hale*, in 1 *Ventris* 238, of a Box brought to a Carrier, with a great Sum of Money in it; and upon the Carrier's demanding of the Owner "what was in it," he answered "that it was filled with Silks and such like Goods of mean Value;" upon which, the Carrier took it, and was robbed: And resolved "that he was liable." But (says the Case) if the Carrier had told the Owner "that it was a dangerous Time; and "if there were Money in it, he durst not take Charge of it;" and the Owner had answered as before; this Matter would have excused the Carrier. In this Case also, I own that I should have thought the Carrier excused, although he had not expressly proposed a Caution against being answerable for Money: For, it was artfully concealed from him, that there was any Money in the Box.

The Case of *Sir Joseph Tyly and Others* against *Morrice*, in *Cartwright* 485, was determined upon the true Principles—"that the Carrier was liable only for what he was fairly told of." Two Bags were delivered to him, sealed up, said to contain 200*l.* and a Receipt taken accordingly, with a Promise "to deliver them to *T. Davis*; he to pay 10*s.* per Cent. for Carriage and *Risque.*" The Carrier was robbed. The Chief Justice was of Opinion that he should answer for no more than 200*l.* "because there was a particular Undertaking by the Carrier for the Carriage of 200*l.* only; and his Reward was to extend no further than that Sum; and 'tis the Reward that makes the Carrier answerable: And since the Plaintiffs had taken this Course to defraud the Carrier of his Reward, they had thereby barred themselves of that Remedy which is founded only on the Reward." So the Jury were (in that Case) directed to find for the Defendant.

For these Reasons, his Lordship was of Opinion, in the present Case, that the Plaintiff ought not to recover.

Mr. Justice YATES held that a Carrier may make a special Acceptance; and that this was a special Acceptance.

By the general Custom of the Realm, a Common Carrier insures the Goods, at all Events: And it is right and reasonable

that he should do so: But he may make a special Contract; or he may refuse to contract, in extraordinary Cases, but upon extraordinary Terms. And certainly, the Party undertaking ought to be apprized what it is that he undertakes: And then he will or at least may take proper Care. But he ought not to be answerable where he is *deceived*. Here he was deceived: The Money was hid in an old Nail-Bag; and it was concealed from him, that it was Money. The Plaintiff's own Letter shews that he knew the Course of this Trade, and that Money was not in that Place carried at the common ordinary Price of carrying other Things. And if he was apprized of the Defendant's Advertisement, that might be equivalent to personal Communication of the Carrier's Refusal to be answerable for Money not notified to him: And this was left to the Jury.

Mr. Justice ASTON, who tried the Cause, said he had no Doubt about the *Justice* of the Case: His Difficulty had only arisen from the Cases and Authorities which had been now mentioned; which put him upon more Caution in admitting the Evidence. But it appeared to be notorious in the Country where this Transaction happened, that the Price of carrying Money from thence to *London* was Three Pence in the Pound: And it manifestly appeared that this was Money sent under a *Concealment* of its being Money. The true Principle of a Carrier's being answerable is the *Reward*. And a higher Price ought, in Conscience, to be paid him for the Insurance of Money Jewels and valuable Things, than for insuring common Goods of small Value. And here, though it was not directly and strictly brought home to the Plaintiff that he had a clear certain Knowledge of the Defendant's Advertisements and Hand-Bills, yet it was highly probable that he must have known of them: And his own Letter shewed his being conscious that he could not recover, by Reason of the Concealment. Therefore I think the Verdict against him ought to stand.

Mr. Justice WILLES concurred in the same Opinion.

Per CUR'. unanimously—

RULE DISCHARGED.

Millar

Millar *versus* Taylor.Thursday
20th April
1769.

THIS CASE was a Revival of the old and often-litigated Question concerning LITERARY PROPERTY: And it was the *first Determination* which the Question ever received, in *this* Court of KING'S BENCH.

The Declaration was of *Michaelmas* Term in the Seventh Year of his present Majesty, 1766. The first Argument at the Bar was on *Tuesday* 30th of *June* 1767: When the Court ordered it to stand over to the next Term, for a second Argument. It was argued, a second Time at the Bar, on the 7th *June* 1768. The first Argument was by Mr. *Dunning*, for the Plaintiff; and Mr. *Tburlow*, for the Defendant: The second, by Mr. *Blackstone*, for the Plaintiff; and Mr. *Murphy*, for the Defendant.

After the second Argument, the following Rule was made; *viz.*

“ *Tuesday* 7th *June* (in *Trinity* Term, 1768.)

“ *Millar.* } “ **I**T is Ordered that this Cause shall stand over for
“ *Taylor.* } “ *the* OPINION of this Court, until the next
“ Term. And, by the CONSENT of the Counsel for *both* Par-
“ ties, it is further ordered, that the *Judgment* which shall then
“ be given, shall be ENTERED UP as a *Judgment* of *THIS* Term,
“ in the same Manner as if the said *Judgment* had been given
“ on *this* Day. Mr. *Blackstone*, for the Plaintiff: Mr. *Mur-*
“ *phy*, for the Defendant.”

Note—Mr. *Millar* DIED the next Morning.

In *Hilary* Term 1769, 9 G. 3. (on *Tuesday* 7th *February* 1769,)

THE COURT ordered it to be set down in the Paper, upon the second Paper-Day of next Term, for the OPINION of the Court.

It would be tedious and tautologous, to repeat the Arguments of the Counsel at the *Bar*, or the Cases and Authorities cited by them; as they were, all of them, so very fully and amply taken up again from the *Bench*, and so elaborately expatiated upon, canvassed, and discussed by the Judges, in delivering their Opinions, and the Reasons whereupon they formed them.

Let

Let it suffice to say, in general, That the Counsel for the Plaintiff insisted, " That there is a *real Property* remaining in " Authors, *after Publication* of their Works ; and that *they ONLY*, " or those who *claim under them*, have a Right to *multiply* the " Copies of such their literary Property, at their Pleasure, for " Sale." And they likewise insisted, " That this Right is a " *Common Law* Right, which *always has existed*, and does *still* " *exist, independent of* and *not taken away by* the Statute of 8 " *Ann. c. 19.*"

On the other Side, The Counsel for the Defendant absolutely *denied* that any such Property remained in the Author, *after the Publication* of his Work : And they treated the Pretension of a *Common Law* Right to it, as mere *Fancy* and *Imagination*, void of any Ground or Foundation. They said, that formerly the *Printer*, not the Author, was the Person who was supposed to have the Right, (whatever it might be :) And accordingly the Grants were all made to *Printers*. No Right remains in the Author, at *Common Law*.

They insisted, that if an original Author *publishes* his Work, he sells it to the Public : And the Purchaser of every Book or Copy has a Right to make *what Use* of it he pleases ; and may *multiply* each Book or Copy, to what Quantity he pleases ; and the *sole exclusive* Right of multiplying such Copies does *not* remain in the Author, *after Publication*. It would be a Monopoly, if it did. The Purchaser of the Book has the *jus fruendi et disponendi*.

The Act of Parliament of 8 *Ann. c. 19.* for the Encouragement of Learning, *vests* the Copies of printed Books in the Authors or Purchasers of such Copies, *during* the Times therein *limited*. But it is *only during that limited Time* ; and under the *Terms* prescribed by the Act. And the utmost Extent of the limited Time is, in the present Case, *expired*.

And they argued from the Case of MECHANICAL INVENTIONS ; where it is admitted, " that the Rule does *not* hold." Yet the *same* Rule ought to hold, in *all similar* Instances. And the Copy of *One* of these is just like the Copy of the *Other* : And a great deal of *mental Labour* is often bestowed upon *Mechanical* Inventions, as well as upon *Literary* Productions.

Of *Michaelmas* Term, in the Seventh Year of the Reign
of King *George* the Third.

London, } **B**E it remembered, that on *Thursday* next after the The Decla-
to wit, } **M**orrow of *All Souls* in this same Term, before our ration.
Lord the King, at *Westminster*, comes *Andrew Millar*, by *John Stir-*
ling his Attorney, and brings into the Court of our said Lord the
King now here, his Bill against *Robert Taylor*, in the Custody of the
Marshal, &c, a Plea of *Trespass upon the Case*: And there are Pledges
of prosecuting, to wit, *John Doe* and *Richard Roe*. Which said Bill
follows in these Words, to wit, *London*, to wit, *Andrew Millar*
complains of *Robert Taylor*, being in the Custody of the Marshal
of the Marshalsea of our Lord the King Himself; for this, to
wit, That whereas the said *Andrew*, on the 20th Day of *January*
in the Year of our Lord 1763, to wit, in the Parish of *St. Mary*
le bow, in the Ward of *Cheap*, was, and hath ever since been,
and still is, the *true and only Proprietor of the Copy* of a certain
Book of Poems, intituled "*The Seasons*, by *James Thomson*."
And whereas the said *Andrew*, after he became and whilst he
was Proprietor of the said Copy as aforesaid, to wit, on the Day
and in the Year abovementioned, in the Parish and Ward afore-
said, did, at his own proper Costs and Charges, cause 2000
Books of the said Copy to be printed for Sale, and afterwards, to
wit, on the 20th Day of *May*, in the Third Year of the Reign
of his present Majesty, in the Parish and Ward aforesaid, had a
great Number, to wit, 1000, of the said Books so printed of the
said Copy intituled, "*The Seasons*, by *James Thomson*," remain-
ing in his Hands for Sale; Nevertheless the said *Robert*, not
ignorant of the Premises, but contriving and fraudulently in-
tending to deprive the said *Andrew* of the whole Profit and Be-
nefit of the said 1000 Books of the said *Andrew*, intituled, "*The*
"*Seasons*, by *James Thomson*," then remaining in his Hands for
Sale, and injuriously to prevent the Sale thereof; afterwards, to
wit, the Day and Year last abovementioned, to wit, in the Parish
and Ward aforesaid, did *publish and expose to Sale* several other
Books, intituled, "*The Seasons*, by *James Thomson*," to wit, 1000
other Books of the like Copy, which last-mentioned Books, intituled,
"*The Seasons*, by *James Thomson*," had been *injuriously printed by*
some Person or Persons without the Licence or Consent of the said An-
drew; and then and there *so'd* several, to wit, 20, of the said last-
abovementioned Books so printed as last mentioned; he the said
Robert then and there well knowing that the same had been so
injuriously printed without the Licence or Consent of the said
Andrew; by Means whereof, the said *Andrew* was *deprived of*
the Profit and Benefit of the said Copy and Book, intituled, "*The*
"*Seasons*, by *James Thomson*," and of the said 1000 Books so
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printed at his Costs and Charges as aforesaid, and then remaining in his Hands unsold: Whereby the said Andrew is injured and hath Damage to the Amount of 200 l.; and therefore he brings this Suit, &c.

Special Verdict.

The Defendant pleaded the general Issue, "Not Guilty." And, upon the Trial, the Jury found a *special Verdict*, as follows, — That the said Work intituled "*The Seasons*" is an *Original Composition* in one Volume, composed by *James Thomson, Esq;* a natural born Subject resident in that Part of *Great Britain* called *England*; and *first printed and published by the said James Thomson, the Author*, for his *own Use and Benefit* as the *Proprietor* thereof, at several Times, between the Beginning of the Year 1727 and the End of the Year 1729, in the City of *London*; the same having never before been printed elsewhere. And the said Jurors upon their said Oath further say, that the said *Andrew Millar*, in the Year 1729, *purchased* the said Work called "*The Seasons*," for a *valuable and full Consideration*, from the said *James Thomson, the said Author and Proprietor*, to Him and his *Heirs and Assigns for ever*. And the said Jurors upon their said Oath further say, That from the Time of the said Purchase, the said *Andrew Millar* hath printed and sold the said Work as his *Property*, and now hath and constantly hath had a *sufficient Number of Books* of the said Work *exposed to Sale at a reasonable Price*. And the said Jurors upon their Oath further say, That *before* the Reign of Her late Majesty *Queen Anne*, it was *usual to purchase from Authors the PERPETUAL Copy-Right of their Books*; and to *assign* the same from Hand to Hand, for *valuable Considerations*; and to make the same the Subject of *Family Settlements*, for the Provision of *Wives and Children*. And the said Jurors upon their Oath further say, That the Stationers-Company, to secure the Enjoyment of the said Copy-Right as far as in them lay, made several By-Laws, particularly the Two following :

At an Assembly of the Masters and Keepers or Wardens and Commonalty of the Mystery or Art of Stationers of the City of *London*, held at their Common Hall in the Parish of *St. Martin Ludgate*, in the Ward of *Farringdon* within *London*, on *Wednesday* the 17th Day of *August* Anno Domini 1681, for the well governing the Members of this Company, the several Laws and Ordinances hereafter mentioned were then made, enacted and ordained by the Master and Keepers or Wardens and Commonalty of the Mystery or Art of Stationers of the City of *London*, in Manner and Form following, *viz.*

And whereas several Members of this Company have great Part of their Estates in *Copies*; and by ancient Usage of this Company,

Company, when any Book or Copy is *duly entered* in the Register-Book of this Company to any Member or Members of this Company, such Person to whom such Entry is made, is and always hath been reputed and taken to be PROPRIETOR of *such Book or Copy*, and *ought to have the sole printing thereof*; which Privilege and Interest is now of late often violated and abused—It is therefore ordained that, where any Entry or Entries is or are, or hereafter shall be duly made, of any Book or Copy in the said Register-Book of this Company, by or for any Member or Members of this Company, that in such Case, if any Member or Members of this Company shall then after, without the Licence or Consent of such Member or Members of this Company for whom such Entry is duly made in the Register-Book of this Company, or his or their Assignee or Assigns, PRINT or CAUSE to be PRINTED, import or CAUSE to be IMPORTED from beyond the Seas or elsewhere, any such Copy or Copies, Book or Books, or any Part of any such Copy or Copies, Book or Books; or shall sell, bind, stitch or expose the same or any Part or Parts thereof to Sale, that then such Member or Members so offending shall FORFEIT, to the Master and Keepers or Wardens and Commonalty of the Mystery or Art of Stationers of the City of London, the Sum of Twelvepence for every such Copy or Copies, Book or Books or any Part of such Copy or Copies, Book or Books, imprinted, imported, sold, bound, stitched, and exposed to Sale contrary hereunto.

At an Assembly of the Masters and Keepers or Wardens and Commonalty of the Mystery or Art of Stationers of the City of London, held at their Common Hall in the Parish of *St. Martin Ludgate*, in the Ward of *Farringdon* within London, on Monday the 14th Day of May Anno Domini 1694, the several Laws, Ordinances and Oath hereafter following were then by them made, enacted, and ordained, for the well-governing of the Members of the Corporation of them the said Master and Keepers or Wardens and Commonalty of the Mystery or Art of Stationers of the City of London, viz.

Whereas divers Members of this Company have great Part of their Estates in COPIES, *duly entered in the Register-Book of this Company*; which, by the ancient Usage of this Company, is, are or always hath and have been used, reputed, and taken to be the RIGHT AND PROPERTY of such Person and Persons (*Members of this Company*) for whom or whose Benefit such Copy and Copies are so duly entered in the Register-Book of this Company; and constantly bargained and sold, amongst the Members of this Company, as their Property; and devised to Children and Others, for Legacies, and to their Widows for their Maintenance; and that
he

he and they to whom such Copy and Copies are so *duly entered, purchased, or devised, ought to have the sole PRINTING thereof;*

Wherefore, for the better Preservation of the said ancient Usage from being invaded by evil minded Men, and to prevent the Abuse of Trade by violating the same, it is ordained, that *after any Entry or Entries is or are or shall be duly made of any Copy or Copies, Book or Books, in the Register-Book of this Company, by or from any Member or Members of this Company, if any other Member or Members of this Company shall, without the Licence or Consent of such Member or Members of this Company for or by whom such Entry is duly made, or of his Assignee or Assigns, print or cause to be printed, import or cause to be imported from beyond the Seas or elsewhere, any such Copy or Copies, Book or Books, or Part of any such Copy or Copies, Book or Books, whereof such due Entry hath been made in the Register-Book of this Company to or for such other Member of this Company; or shall sell, bind, stitch or expose the same, or any Part or Parts thereof, to Sale, without such Licence; that then such Member and Members so offending shall forfeit and pay to the Master and Keepers, or Wardens and Commonalty of the Mystery or Art of Stationers of the City of London, the Sum of Twelvepence for every such several Copy or Copies, Book or Books, Part or Parts of every such Copy or Copies, Book or Books, imprinted, imported, sold, bound, sticht, or exposed to Sale without such Licence or Consent as aforesaid.*

And the said Jurors upon their said Oath further say, That the said Book or Work intituled "*The Seasons*" was, upon the said Purchase thereof by the said *Andrew Millar*; and before the Publication and Sale thereof by the said *Robert Taylor*, DULY ENTERED in the Register of the Company of Stationers of the City of London, as the whole and sole Property of the said *Andrew Millar*. And the said Jurors, upon their said Oath further say, That the said *James Thomson*, the said Author of the said Work, died on the 29th Day of August in the Year 1748; and that after his Death, and before the above Action was brought, the said *Robert Taylor*, without the Licence or Consent of the said *Andrew Millar*, on the 20th Day of May in the Year 1763, PUBLISHED, EXPOSED TO SALE, AND SOLD, within that Part of Great Britain called England, several Copies of the said Book, intituled, "*The Seasons*," by *James Thomson*;" which last-mentioned Copies had been printed by some Person or Persons without the Licence or Consent of the said *Andrew Millar*; whereby the said *Andrew Millar* hath been and is damnified. But whether, upon the whole Matter aforesaid in Form aforesaid found, the said *Robert Taylor* is LIABLE IN LAW to answer the Damages sustained by the said *Andrew Millar* by Reason or Means of the said *Robert Taylor*'s publishing, selling and exposing to Sale within that Part of Great Britain called

England

England the said several Copies of the said Book intituled "The Seasons, by James Thomson," without the Licence or Consent of the said Andrew Millar as aforesaid, the Jurors aforesaid are altogether ignorant; and therefore pray the Advice of the Court here. And if upon the whole Matter by the said Jurors in Form aforesaid found, it shall seem to the Court here, that the said Robert Taylor is liable by Law to answer the Damages sustained by the said Andrew Millar on the Occasion of the Premises within mentioned, then the said Jurors upon their said Oath say, that the said Robert Taylor is guilty of the Premises within laid to his Charge, as the said Andrew Millar hath within complained against him; and assess the Damages to the said Andrew Millar occasioned by the Premises within mentioned, besides his Costs and Charges by him about his Suit in this Particular laid out, to One Shilling; and for such Costs and Charges, to Forty Shillings. And if upon the whole Matter aforesaid by the Jury aforesaid in Form aforesaid found, it shall seem to the Court here, that the said Robert Taylor is not liable in Law to answer for the Damages within mentioned; then the said Jurors upon their Oath aforesaid say, that the said Robert Taylor is not guilty of the Premises within laid to his Charge, as the said Andrew Millar within in Pleading hath alledged.

THE short Substance of the Case is no more than this. The Declaration charges, That the Plaintiff Millar was the true and only Proprietor of the Copy of a Book of Poems, intituled, "The Seasons, by James Thomson;" and, whilst he was so Proprietor of the said Copy, caused 2000 Books of it to be printed for Sale, at his own Expence; and had a great Number of the said 2000 Books remaining in his Hands for Sale. That the Defendant Taylor published and exposed to Sale several other Books of the like Copy, and bearing the same Title; which latter Books had been injuriously printed by some Person or Persons without the Licence or Consent of the Plaintiff Millar; The Defendant knowing "that they had been so injuriously printed, without the Plaintiff's Licence or Consent." By means whereof, the Plaintiff Millar was deprived of the Profit and Benefit of the said Copy and Book, and of the Books printed at his Expence as aforesaid, and then remaining in his Hands unsold. And he lays his Damages at 200*l*. The Defendant Taylor pleads "Not Guilty." Issue is thereupon joined. And the Jury find the Special Verdict as above.

THE JUDGES delivered their Opinions separately, and at large; The junior Judge beginning, and so proceeding upward to the Lord Chief Justice.

Mr. JUSTICE WILLES, after stating the Case and Special Verdict, spoke to the following Effect. The Questions of Law must arise out of the Facts found by this Verdict. Some of them are worthy of Observation.

It is found "that the Work is an *Original Composition*, first printed and published in *London*; the *Author*, a natural born Subject, *resident in England*." Therefore this Case has nothing to do with *foreign Books*; which stand on a very different Footing.

It is found, "that the *Author printed* this Work from the Beginning of the Year 1727, to the End of 1729, for his *own Use and Benefit, as the Proprietor*; and then sold the Copy to the Plaintiff, *his Heirs and Assigns for ever*, for a *full and valuable Consideration*." Therefore there is no Occasion to meddle with Cases, where the Author may be supposed to have *relinquished* the Copy, and consequently to have *given a general Licence to print*.

Many of the best Books fall under *that Description*. A very little Evidence might be sufficient, *after the Author's Death*, to imply *such a tacit Consent*: As if the Book had *not been entered before Publication*; it would be a Circumstance to be submitted to the Jury, "that the Copy was *intended to be left open*." So, if *after Publication*, the Author had *not transferred* his Right, or *acted himself as Proprietor*.

But the Finding here, being of a *Sale and Transfer for a valuable Consideration*, this Verdict will not authorize any Claim founded on the *supposed Consent* of the Author.

It is also found, "That the Plaintiff always had a sufficient Number of these Books exposed to Sale, at a *reasonable Price*." Therefore this Case has nothing to do with Cases where the Plaintiff's Relief may be rebutted, by shewing that he *meant to enhance the Price*; which is against Law.

It is found too "That the Defendant sold several Copies of the SAID Book." And therefore this Case is not embarrassed with any Question, "*wherein consists the IDENTITY of a Book*."

Certainly *bonâ fide Imitations, Translations, and Abridgments* are different; and, in respect of the Property, may be considered as *new Works*: But *colourable and fraudulent Variations* will not do.

This

This is *not* the Case of an *unpublished Manuscript* taken in *Execution* by Creditors, or *claimed by Assignees* under a Commission against a *Bankrupt-Author*. When a Question of that Sort *arises*, the Court will consider what is Right. And the same Question may equally arise upon the Term granted by the *Act of Parliament*. And therefore this is not a Doubt which subsists *merely* on the *Common Law Right*.

If the Copy of the Book belonged to the Author, there is no Doubt but that he might *transfer* it to the Plaintiff. And if the Plaintiff, by the Transfer, is *become the Proprietor* of the Copy, there is as little Doubt that the Defendant has done him an *Injury*, and *violated his Right*: For which, this Action is the *proper Remedy*.

But the *Term of Years secured by 8 Ann. c. 19.* is *expired*. Therefore the *Author's Title to the Copy* depends upon Two Questions——

- 1st. Whether the *COPY of a Book, or literary Composition*, belongs to the *Author*, by the *COMMON LAW*:
- 2d. Whether the *COMMON LAW-RIGHT of Authors* to the Copies of their *own Works* is *TAKEN AWAY by 8 Ann. c. 19.*

The *Name*, “*COPY of a Book*,” which has been used for Ages, as a Term to signify the *SOLE Right of printing, publishing and selling*, shews *this Species of Property* to have been *long known*, and to have *existed in Fact and Usage*, as long as the *Name*.

Till the Year 1640, the Crown exercised an unlimited Authority over the Press; which was enforced by the summary Powers of Search, Confiscation and Imprisonment, given to the Stationers Company, all over the Realm and the Dominions thereunto belonging, and by the then supreme Jurisdiction of the Star-Chamber, without the least Obstruction from *Westminster-Hall*, or the Parliament, in any Instance.

“Whether *before 1640*, Copy-Rights *existed in this Kingdom* upon *Principles and Usage*,” can be only looked for in the *Stationers Company*; or the *Star-Chamber*, or *Acts of State*.

As to *this Point*, their Evidence is competent, and liable to *LITTLE Suspicion*. It was indifferent to the Views of Government, whether the Copy of an innocent Book licensed, was *open*, or *private Property*. It was certainly *against* the Power of
the

the Crown, to allow it as a *private Right*, without being protected by any Royal Privilege.

It could be done only on Principles of *private Justice, moral Fitness*, and *public Convenience*; which, when applied to a *new Subject*, make Common Law *without* a Precedent; much more, when received and approved by *Usage*.

It appears from the Acts of State taken Notice of at the Bar, that unless *Pirating another Man's Copy* be an Abuse on such Principles as *make* Common Law, it was *not prohibited*. If it be such an Abuse, then there are *general Words* in several Prohibitions, to *include* it.

* 20 June
1566.
Styke's Life
of Archbishop
Parker, 221.

The Decree of the Star-Chamber in 1556, regulating the Manner of Printing and the Number of Presses is confirmed, with additional Penalties, by Ordinances of the Star-Chamber * signed by Sir N. Bacon, Ld. Burleigh, and all the most eminent Privy Counsellors of that Age.

Among other Things, it is forbidden to print against the Force and Meaning of any Ordinance, Prohibition or Commandment in any of the Statutes or *Laws* of this Realm; or in any Injunction, Letters Patent, or Ordinances set forth or to be set forth by the Queen's Grant, Commission or Authority.

† Styke's
Life of Arch-
bishop Whit-
gift, 222-3.
and Appen-
dix, No. 24.

By another Decree of the *Star-Chamber*, 23 June 1585, 28 *Eliz. Art. 4.* † Every Book, &c, is to be licensed—"nor shall any One print any Book, Work or Copy, against the Form or Meaning of any Restraint contained in any Statute or *Laws* of this Realm, or in any Injunction made by her Majesty or her Privy Council; or against the true Intent and Meaning of any Letters Patent, Commissions or Prohibitions under the Great Seal; or contrary to any *allowed* Ordinance set down for the good Government of the Stationers Company."

A Proclamation of the 25th September 1623, 21 *Jac. 1.* recites the above Decree of 28 *Eliz.* and that the same had been evaded, amongst other Things, "By *printing beyond Sea* such *allowed* Books, Works or Writings, as have been imprinted within the Realm by such to whom the *sole Printing thereof*, by Letters Patent, or lawful Ordinance or *Authority*, doth appertain." And then this Proclamation enforces the said Decree.

By another Decree of the Star-Chamber, made on 11th July 1637, Article the 7th,—No Person is to *print*, or *import* (printed abroad) any Book or Copy which the Company of Stationers, or any other Person hath or shall, by any Letters Patent, Order or Entrance

Entrance in their Register-Book, *or otherwise*, have the Right, Privilege, Authority or Allowance *SOLELY to print*.

These are all the Acts of State relative to this Matter.

No Case of a Prosecution in the *Star-Chamber*, for printing *without Licence*, or *against Letters Patent*, or *pirating another Man's Copy*, or *any other disorderly printing*, has been found. Most of the Judicial Proceedings of the *Star-Chamber* are *lost or destroyed*.

But it is certain, that *down to the Year 1640*, Copies were *protected and secured from Piracy*, by a *much speedier and more effectual Remedy*, than *Actions at Law*, or *Bills in Equity*.

No LICENCE could be obtained, “to *print another Man's Copy* :”—Not from any *Prohibition* ; but *because the Thing was immoral, dishonest, and unjust*. And he who printed *WITHOUT a Licence*, was liable to *great Penalties*.

Mr. *Blackstone* argued very materially from the Books of the Stationers Company ; and read many Entries. And from the Extract of them, it appears that there is *no Ordinance or By-Law* relative to COPIES, till *after the Year 1640* : And yet, from the *Erection* of the Company, Copies were *entered as Property* ; and *pirating was punished*.

Their first *Charter* was in 1556 ; their second, in 1558.

In 1558, and down from that Time, there are *Entries of Copies* for particular Persons.

In 1559, and downward from that Time, there are Persons *fined for printing other Men's Copies*.

In 1573, there are Entries which take Notice of the *Sale of the Copy*, and the *Price*.

In 1582, there are Entries with an express Proviso, “that if “it be found *any Other has Right to any of the Copies*, then the “*Licence*, touching such of the Copies *so belonging to another*, “shall be *void*.”

It is remarkable, that the Decree of the *Star-Chamber* in 1637 expressly supposes a *Copy-Right to exist otherwise* than by Patent, Order, or Entry in the Register of the Stationers Company : Which could *only* be by *COMMON Law*.

But in 1640, the *Star-Chamber* was abolished. The Troubles began soon after. The King's Authority was set at naught: All Regulations of the Press, and Restraints of unlicensed Printing, by Proclamations, Decrees of the Star-Chamber, and Charter-Powers given to the Stationers Company, were deemed to be, and certainly were *illegal*.

The *Licentiousness of Libels* induced the Two Houses to make an Ordinance which *prohibited Printing*, unless the Book was first *licensed, and entered in the Register of the Stationers Company*. COPY RIGHTS, in *their* Opinion, then, could only stand upon the COMMON LAW: Both Houses take it for granted.

The Ordinance therefore prohibits *Printing*, without *Consent of the Owner*; or *Importing* (if printed abroad;) upon Pain of *forfeiting* the same to the OWNER OR OWNERS of the Copies of the said Books, &c.

This Provision necessarily supposes the *Property* to EXIST: It is nugatory, if there was no OWNER. An Owner could not, at that Time, exist, *but by the COMMON LAW*.

In November 1644, MILTON published his famous *Speech*, for the Liberty of *unlicensed Printing*, against this Ordinance: And among the Glosses which he says were used to colour this Ordinance, and make it pass, he mentions "the just retaining
" of each Man his several Copy; *which God forbid should be*
" *gain-said!*"

So little did he, (though an Enthusiast for Liberty,) think that the Liberty of unlicensed Printing should extend to *violate the Property of Copies!* And yet, this Copy-Right could, at that Time, stand upon no other Foundation, than *natural Justice and Common Law*. Those who were for, and those who were against a Licensor, all agreed "That Literary Property was not
" the Effect of arbitrary Power, but of *Law and Justice*; and
" *therefore ought to be safe.*"

In 1649, the Long Parliament made an Ordinance which *forbids printing* any Book *legally granted*, or any Book *entered*, without *Consent* of the Owner; upon Pain of Forfeiture, &c.

The same Observations occur upon this last, as upon the former Ordinance.

In 1662, the Act of 13 & 14 C. 2. (the Licensing Act) prohibits printing any Book, unless *first licensed, and entered* in the Register of the Stationers Company: It also prohibits Printing
without

without the Consent of the OWNER, upon Pain of forfeiting the Book, and 6s. 8d. each Copy; half to the King, and half to the OWNER; to be sued for by the *Owner*, in Six Months; besides being otherwise prosecuted as an Offender against the Act.

The Act supposes an *Ownership at Common Law*. And the *Right* itself is particularly recognized in the latter Part of the third Section of the Act; where the Chancellor and Vice-Chancellor of the Universities are forbid to meddle with any Book or Books, the *Right* of printing whereof doth *solely and properly belong to any particular Person or Persons*.

The *sole Property* of the Owner is here *acknowledged in express Words*, as a *Common Law Right*: And the Legislature who passed that Act, could never have entertained the most distant Idea, “that the Productions of the Brain were not a Subject Matter of Property.” To support an Action on this Statute, *Ownership* must be *proved*; or the Plaintiff could not recover: Because the Action is to be brought by the *Owner*; who is to have a Moiety of the Penalty.

The *various Provisions* of this Act *effectually prevented Piracies*; WITHOUT Actions at Law, or Bills in Equity, by Owners.

But Cases arose of *disputed Property*. Some of them were between different Patentees of the Crown: Some, “whether it belonged to the *Author*, from his Invention and Labour; or the *King*, from the Subject Matter;” which occasioned these Points to be agitated in *Westminster Hall*.

The first Case on this Subject was between *Atkins*, the Law-Patentee, and some Members of the Stationers Company. The Plaintiff claimed under the Law-Patent. The Defendants had printed *Roll's Abridgment*. The Bill was brought for an Injunction. And the Lord Chancellor awarded an Injunction against every Member of the Company. The Defendants appealed to the House of Lords: And the Decree was affirmed.

M. 18 C. 2.
in Parlia-
ment. Vid.
Carter 89.

This was argued on the Footing of a *Prerogative Copy-Right* in the *Crown*, in *all Law-Books*. It was urged, that the King *pays the Judges* who pronounced the Law—That the Laws are the *King's Laws*, &c. I do not enter into the Reasons of the Determination; but only cite it to show that the Lords went upon this Doctrine, which was not disputed, “that a *Copy-Right* was a “Thing acknowledged at *Common Law*.” And then they agreed “that the King *had* this Right, and had *granted* it to the Patentees.” In *this* Light, this Case was very properly stated by

Mr. *Blackstone*; and argued from, as being an Authority in his Favour.

The next Case was that of *Roper v. Streater, Skinner* 234. and mentioned and alluded to, in 1 *Mod.* 257. Which came on, before this Court (Lord Chief Justice *Hale* then presiding) about 22 C. 2. and Judgment was given M. 24 C. 2. *Roper* had bought, from the Executors of Mr. Justice *Croke*, the third Part of his Reports. *Streater* was Law-Patentee; and reprinted it, without the Plaintiff's Consent. *Roper* brought an Action of Debt, as Owner, upon the *Licensing Act*. *Streater* pleaded the *King's Grant*. Upon which, the Plaintiff demurred: And it was adjudged for the Plaintiff, in the Common Pleas. Which is a judicial Authority in Point, "that the Plaintiff, by Purchase from the Executors of the Author, was OWNER of the Copy at Common Law."

* On 26th
May, 1705

Nor did the Reversal * in the House of Lords at all shake this Authority; because the Reversal proceeded (as in the Case of *Atkyns*) upon an Opinion "That the Copy belonged to the King."

Besides, it appears that the Judges were not asked their Opinions, on this Occasion: And probably they would not have concurred in the Reversal; as the Majority of the House of Lords, who were for reversing, refused to hear their Opinions. For, it is said, in the Journals, that after various Debate and Consideration, the Question was propounded "Whether the Judges should be heard in this Case:" And it was resolved in the Negative; dissentiente Anglesey.

In the Argument of the Case of *The Stationers Company* against *Parker*, in *Skinner* 233, it is said, "It is true, that this Action of *Roper v. Streater* was brought on the Act of 14 C. 2. which is expired. But that Statute did not give a Right, but only an Action of Debt." [*Vide Skinner*, 234.]

The next Case is that of *The Company of Stationers v. Seymour*, 29 Car. 2. in 1 *Mod.* 256. The Plaintiffs, as Grantees of the Crown, brought an Action of Debt against the Defendant, for printing *Gadbury's Almanac*. *Pemberton*, in his Argument said, when Sir *Orlando Bridgman* was Chief Justice in this Court (the Common Pleas) there was a Question raised concerning the Validity of a Grant of the sole printing of any particular Book, with a Prohibition to all Others to print the same; "How far it should stand good against those who claim a Property PARAMOUNT the King's Grant:" And Opinions were divided on that Point.

But (said he) the Defendant, in our Case, makes *no* Title to the Copy: He only pretends a Nullity in our Patent.

The Book which this Defendant hath printed has *no certain Author*: And then, according to the Rules of Law, the *King* has the Property; and, by Consequence, may grant his Property to the Company.

The Court thought that *Almanacs* might be *Prerogative Copies*; and said, "These *Additions* of Prognostications do not "alter the Case; no more than if a Man should claim a Property in *another Man's Copy*, by Reason of some *inconsiderable Additions of his Own*."

These were Times when *Prerogative* ran high. But still these Cases prove "that the *Copy-Right* was at *that Time* a *well-known Claim*;" though the overgrown Rights of the Crown were, in some Instances, allowed and adjudged (as in *this Case*) to overrule them.

The *Licensing Act* of C. 2. was continued by several Acts of Parliament; but *expired* 9th May, 1679. 31 C. 2. Soon after which, there is a Case in *Lilly's Entries*, of *Hilary Term* 31 C. 2. B. R. * an Action on the Case brought for printing the *Pilgrim's Progress*; of which the Plaintiff was and is the true Proprietor; whereby he lost the Profit and Benefit of his Copy. But I don't find, that this Action was ever proceeded in. * Lilly's Entries 67, Ponder v. Bradyl.

The *Licensing Act* of 13 & 14 C. 2. was *revived* by 1 Jac. 2. c. 7; and continued by 4 W. & M. c. 24; and *finally expired* in 1694.

For Five Years successively, Attempts were made for a *new Licensing Act*. Such a Bill once passed the House of *Lords*: But the Attempts miscarried, upon Constitutional Objections to a *Licenser*.

The Proprietors of Copies applied to Parliament, in 1703, 1706, and 1709, for a Bill to protect their Copy-Rights which had been invaded, and to secure their Properties. They had so long been secured by *Penalties*, that they thought an *Action at Law* an *inadequate Remedy*; and had no Idea a *Bill in Equity* could be entertained, but upon *Letters Patent* adjudged to be *legal*. A *Bill in Equity*, in any *other Case*, had *never* been attempted or thought of: An *Action* upon the Case was thought of in 31 C. 2; but was * *not proceeded in*. * Ponder v. Bradyl.

In one of the Cases given to the Members in 1709, in Support of their Application for a Bill, the last Reason or Paragraph is as follows—"The Liberty now set on Foot of breaking through this ancient and reasonable Usage is no way to be effectually restrained, but by an Act of Parliament. For, by *Common Law*, a Bookseller can recover no more *Costs* than he can prove *Damage*: But it is impossible for him to prove the Tenth, nay perhaps the Hundredth Part of the Damage he suffers; because a Thousand Counterfeit Copies may be dispersed into as many different Hands all over the Kingdom, and he not be able to prove the Sale of Ten. Besides, the Defendant is always a Pauper: and so the Plaintiff must lose his Costs of Suit. (No Man of Substance has been known to offend in this Particular; nor will any ever appear in it.) Therefore the only Remedy by the *Common Law*, is to confine a Beggar to the Rules of the King's Bench or Fleet: and there he will continue the evil Practice with Impunity. We therefore pray, that CONFISCATION of Counterfeit Copies be One of the Penalties to be inflicted on Offenders."

On the 11th of *January* 1709, pursuant to an Order made upon the Booksellers Petition, a Bill was brought in, for securing the Property of Copies of Books to the *rightful Owners*, &c. On the 16th of *February*, 1709, The Bill was committed to a Committee of the whole House; and reported with Amendments, on the 21st of *February*, 1709.

I shall consider the Bill as it passed into a Law, and the Arguments drawn from the Alterations made in the Course of its passing in the House of Commons, when I come to the second Head or Question which I proposed to speak to; and now proceed upon the Fact of Usage and Authority since 1709.

The Court of Chancery, from that Time to this Day, have been in an Error, if the whole Right of an Author in his Copy depends upon this *positive* Act, as introductive of a *new* Law. For, it is clear, the Property of no Book is intended to be secured by this Act, unless it be ENTERED: Nobody offends against this Act, unless the Book be ENTERED. Consequently, the *sole Copy-Right* is *not given* by the Act, UNLESS the Book be entered. Yet it is held *unnecessary* to the Relief in *Chancery*, that the Book should be entered.

There is also an express Proviso, "That all Actions, Suits, Bills, &c, for any Offence that shall be committed against this Act, shall be brought, sued and commenced *within three* Months

“ *Months* after such Offence committed; or else, the same shall
“ be void and of none Effect.”

IF all Copies were *open and free before*, Pirating is *merely* an Offence against Statute; and can only be questioned, in any Court of Justice, *as an Offence against this Act*. Yet it is *not* necessary that the *Bill in Chancery* should be brought *within* three Months.

Again, IF the *Right vested*, and the *Offence prohibited* by this Act be *new*, no Remedy or Mode of Prosecution can be pursued, *besides those prescribed by the Act*. But a *Bill in Chancery* is *not* given; and consequently *could not be brought upon this Act*.

There is no Ground, upon which this Jurisdiction *has* been exercised or *can* be supported, except the ANTECEDENT *Property*; *confirmed*, and *secured for a limited Term*, by this Act. In *this Light*, the ENTRY of the Book is a Condition in respect of *Statutory Penalty only*: So likewise the Three Months is a Limitation in respect of the *Statutory Penalty only*. But the Remedy by an *Action upon the Case*, or a *Bill in Chancery*, is a Consequence of the *Common Law-Right*; and is *not affected* by the *Statutory Condition or Limitation*.

Mr. *Murphy* cited and laid Stress upon the Case of *Millar v. Kincaid et al.* in the House of Lords, 11th of February 1750. In that Case, the Suit was brought upon the 8 Queen Ann and 12 G. 2. c. 36, by Seventeen Booksellers of *Lonaon*, Plaintiffs, against Twenty-four Booksellers of *Edinburgh* and *Glasgow*, Defendants; for having offended against these two Acts, as to many Books specified; praying the Penalties, and an Injunction and Account, by Way of Damages.

The Plaintiffs restrained their Demand to an Account of Profits, by Way of *Damages*, for Two or Three Books only.

The Court found, “ That there lies *no Action of Damages*, in
“ this Case.” 1st Interlocu-
tor, 4th July,
1746.

The Plaintiffs petitioned for a Rehearing; and insisted that the 8 of Queen Ann gave an ADDITIONAL *Security by Penalties*, *during a limited Time*, to a *Property* which EXISTED BEFORE; and therefore was *declaratory of the Property*; and that the Court of *Chancery* had always understood it in *this Sense*, and *given Relief*, in Consequence of the *COMMON-Law Property*, declared, and *secured by the Act for a limited Time by Penalties*.

The Court found, “ That an Action of Damages lies, to the
“ Extent of the Profits made by the Defendants, on such of the
“ Books 2d Interlocu-
tor, 24th
December,
1746.

“ Books libelled, as have been *entered* in the Stationers Hall and
 “ *reprinted* in Britain.”

The Defendants prayed a Review.

The Court ordered the Cause to be re-argued; and directed them to consider “ Whether, by the Laws of *Scotland*, an *Action* lay, at the Instance of an Author or Proprietor of a Book, BEFORE *the Statute*.”

The Cause was further heard and debated: But *both Sides avoided* the Question upon the *Common Law*. The Plaintiffs, probably, were advised not to put their Case upon the *Common Law of Scotland*; because the Books were printed and published in *London*, and therefore might be considered as *foreign Books*. And the Defendants, thinking themselves strong against an Action of *Damages* upon the *Statute*, rested upon that Ground; and insisted that the Action being brought *upon the Statute*, the Plaintiffs could not resort to the *Common Law*.

3d Interlocutor, 2 December, 1747.

The Court therefore gave *no Opinion*, as to the *Common Law*; but found, “ That *no Action* lies on the *Statute*, for Offences against the same, *except* when it is brought *within Three Months* after the Committing such Offence: And that *no Action* lies, *except* for such Books as have been *entered* in Stationers Hall in Terms of the *Statute*.” And “ that *no Action* of *Damages* lies on the *Statute*.”

The Plaintiffs prayed a Review; and objected to the Ambiguity of the Proposition, “ That *no Action* of *Damages* lies on the *Statute*,” because they did not contend “ that such Action was *given by the Statute*,” but that it *followed* the ANTECEDENT Property, declared and secured by the *Statute*. And they urged the Practice of the Court of *Chancery*.

4th Interlocutor, 7 June 1748.

The Court found, “ That *no Action* of *Damages* does lie upon or in Consequence of the *Statute*, but only for the PENALTIES.”

The Plaintiffs appealed to the House of Lords. In their Reasons annexed to the printed Case, they say “ The Court of *Chancery* has construed 8 *Ann*, as *declaratory* of an *Author's Property*; and the Remedies and Penalties thereby given for a *limited Term*, upon certain *Conditions*, as ADDITIONAL SANCTIONS only, to preserve that Property from being injured.” And in another Part of the Reasons, they insist “ That it is like the Case of a Patent granted for any new and useful Invention: The Patentee, in Consequence of his *Property*, is intitled to the *ordinary Relief* in Courts of Law and Equity.”

It

It is remarkable that the Respondents, (who had very able Men for their * Counsel,) in *their* Reasons, do not litigate, “ that the Statute was to be considered as giving an *additional* Sec-
 “ curity;” nor consequently, the Competence of an Action for Damages: They only say, “ If it is taken as an Action upon the
 “ Case, it can not be *joined* with an Action for the *Penalties*;
 “ and insist, from Objections to the Method of proceeding, that
 “ the Plaintiffs *could not recover*.”

* Mr. Home
 Campbell and
 Mr. York.

Mr. *Murphy* cited a Manuscript, which says, Lord *Hardwicke*, in moving for the Resolution of the House, spoke to the following Effect—“ As to the *Origin of Relief* given in the Court
 “ of *Chancery*, by *Injunction and Account*—The Statute of *Jac. 1.*
 “ which took away *Monopolies*, at the same Time *gave* the King
 “ a Power to grant *Patents* for the Encouragement of new In-
 “ ventions *for Fourteen Years*. These Patents were *inrolled in*
 “ *Chancery*: and the Court, upon Complaint of the Patentee,
 “ would take Notice of its *own Records*.”

“ The Statute of *Queen Ann* might be considered as a *stand-*
 “ *ing Patent* to Authors: And, being a *Record of the highest Na-*
 “ *ture*, the Court will give Relief.

“ But he *doubted* whether that Statute was *declaratory* of the
 “ *Common Law*; or *introductive* of a *new Law*, to *give* learned
 “ Men a Property which they had *not* before.

“ He said, it was material to consider how the *Common*
 “ *Law of Scotland* stood before the Statute: And he repeated,
 “ more than once, that as the Question could not be judicially
 “ determined upon the present Appeal, he would be *still open* to
 “ all Reasonings upon the Subject; and would *not* be under-
 “ stood to give an Opinion which might *bind* himself.”

This Account of what Lord *Hardwicke* said, is taken from a Letter said to be written to the Respondents in *Scotland*, by their Solicitor. It purports only to be *Heads*, by way of *Narration*; and *not* a Report of his *Words*, or the *Order* in which he spoke, or *all* he said; and plainly contains what the Solicitor thought would make most for his Clients.

Lord *Hardwicke* must have intimated *more* of his Opinion than is mentioned in the Letter; by his repeatedly guarding “ that he
 “ would not be understood to give an Opinion which might
 “ bind himself.”

What he is reported to have said, is very material, in this Light.

The only Question brought before the House by the Appeal, was, "Whether any Remedy lay, in consequence of the Statute, *except for the Penalties.*"

Lord HARDWICKE states the Doubt to be, "Whether the Statute was *declaratory of the Common Law*; or *introductory of a new Law*, to give Learned Men a Property which they *had not before.*" He states no Doubt, "Whether any Remedy could lie, except for the Penalties only, *if the Act gave a new Property.*"

The Doubt was a Question of *Construction* upon the Statute, not to be solved by the *Words*; for there are *no Words* declaratory of the Common Law: And there is an express Proviso against *Inferences* either Way.

The Question then depended upon settling "whether the Property *existed* by the *Common Law.*" *If it did*, the Act confirms that Right, and secures it by Penalties. *If there was no Right at the Common Law*, then the Act gives a *new Right* upon Condition, under a *Sanction specially prescribed.* Therefore says Lord HARDWICKE, it is material to consider "How the Common Law of Scotland stood, *before the Statute.*"

As to what he is reported to have said of the Relief given in Chancery—The Solicitor has certainly *omitted* something.

Lord HARDWICKE could never ground the Relief given to a Patentee, merely upon the Patent being *inrolled in Chancery*: Much less could he argue from thence to an Act of Parliament, *merely* because it was a Record of a *higher Nature*; without saying a Word as to the *Construction* of the Act, upon which the Court of Chancery proceeded; though that was the *only Thing* material, and relied upon in the Argument as *decisive.*

The printed Reasons argued from the Relief given upon Patents for new Inventions, by Action or Bill, as a parallel Case.

Supposing a *Common Law Property secured and confirmed* by the Statute *for a Term*; this legal Right stands upon the same Ground with the legal Right excepted in the Act of 21 Jac. 1. But supposing the Privilege given to Authors by this Act, to *arise out of a new Prohibition*; there is no Colour, from the Case of *Letters Patent*, for the Jurisdiction exercised by the Court of Chancery upon 8 Ann.

In *Letters Patent*, all the Conditions required by 21 *Jac.* 1. must be observed. Patentees for new Inventions are left, by that Statute, to the Common Law, and the Remedies which follow the Nature of their Right.

But this Statute of the 8th of Queen *Ann*, is a *penal* Statute; which prescribes the Remedy for the Party aggrieved, and the Mode of Prosecution, to be commenced with Three Months. Upon *such* an Act, if the Offence, and consequently the Right which arises from the Prohibition, be *new*, no Remedy or Mode of Prosecution can be pursued, except what is directed by the Act.

The Statutes which prohibit Interlopers, give, by that Prohibition, the sole *East India* Trade to the Company. The Trade was free before. Consequently, the Statutes create a *new* Offence. Was it ever imagined that any Remedy could be pursued by the Company, except those prescribed by the Statutes?

Where an Act *enforces a Duty with Penalties*, the ordinary Remedies follow the *Debt of Obligation to pay*; and the Penalties are by Way of Security. But where the *Privilege to one Person* arises out of and consists in a *new Prohibition to Others*, there is no Proceeding but for a *Breach of the Prohibition*. If the Act has prescribed the Remedy for the Party grieved, and the Mode of Prosecution; all other Remedies and Modes are excluded.

If a *conditional* Right is created by an Act of Parliament, the Condition can not be dispensed with. If the same Act, which creates the Right, limits the Time within which Prosecutions for Violation of it shall be commenced, that Limitation can not be dispensed with.

Therefore the *whole Jurisdiction* exercised by the Court of Chancery since 1710, against *Pirates of Copies*, is an Authority "That Authors had a Property antecedent; to which the Act gives a temporary additional Security:" It can stand upon no other Foundation. And I am persuaded Lord *Hardwicke* dropt something as to the Reasons and Grounds of the Relief given by the Court of Chancery, in consequence of this Act; which occasioned his repeating, more than once, "that he would be still open to all Reasonings upon the Subject."

The Order declares, "That the Action brought by the Appellants in the Court of Session in *Scotland* was improperly and inconsistently brought, by demanding at the same Time a Discovery and Account of the Profits of the Books in Question,"

“ tion, and *also the Penalties* of the Acts of Parliament, (which
 “ the Appellants had never absolutely waved in the Proceedings
 “ below;) and also by *joining several Pursuers*, claiming distinct
 “ and independant Rights in different Books, in the *same Action*;
 “ and that therefore the Points determined by the said Inter-
 “ locutors could not regularly come in Question in this Cause:
 “ And therefore ORDERED and ADJUDGED that the said several
 “ Interlocutors be *reversed, without Prejudice* to the Determina-
 “ tion of any of the said Points, when the same shall properly be
 “ brought in Judgment. And it is hereby also declared, that
 “ Libel in this Cause is *nonrelevant*: And ordered, that the said
 “ Court of Session do proceed accordingly.”

IF the Ground of the Relief in Chancery, *during the Continuance* of the Term given by the Act, was the *antecedent Property*; it is not to be wondered, that *after the Expiration of the Term*, the Court had no Difficulty to grant the same Relief, *merely upon the Common Law Right*.

But before I mention the Cases, it may be proper to premise what will put the Authority of them in its true Light.

Injunctions to stay *printing* or the *Sale* of Books printed, are in the Nature of Injunctions to stay *Waste*: They never are granted, but upon a clear Right. If moved for, upon filing the Bill; the *Right* must appear clearly, by Affidavits: If continued, after the Answer put in; the *Right* must be clearly admitted by the Answer, or not denied.

Where the Plaintiff's Right is *questioned* and *doubtful*, an Injunction is *improper*; because *no Reparation* can be made to the Defendant for the Damage he sustains from the Injunction: But if the Defendant proceeds to commit the Waste or Injury, the Plaintiff may afterwards have *Compensation*.

Few Bills against Pirates of Books are ever brought to a Hearing. If the Defendant acquiesces under the Injunction, it is seldom worth the Plaintiff's while to proceed for an Account; the Sale of the Edition being stopped.

From the Year 1709 to this Day, there have not been more than two or three such Causes *heard*.

The Question upon the Common Law-Right, could not arise till 21 Years from the 10th of *April* 1710, for old Copies: Consequently, the soonest it could arise was after the 10th of *April* 1731.

On the 9th of June 1735, in the Case of *Eyre v. Walker*, Sir Joseph Jekyll granted an Injunction to restrain the Defendant from printing the *Whole Duty of Man*; the first Assignment of which * had been made in December 1657: And this was acquiesced under.

* Dr. Hammond's Letter to the Book-fellers.

In the Case of *Motte v. Falkner*, 28th November 1735, an Injunction was granted for printing *Pope's* and *Swift's* Miscellanies. Many of these Pieces † were published in 1701, 1702, 1708: And the Counsel strongly pressed the Objection, as to these Pieces. Lord Talbot continued the Injunction, as to the Whole: And it was acquiesced under. Yet *Falkner*, the Irish Bookfeller, was a Man of Substance; and the general Point was of Consequence to him: But he was not advised to litigate further.

† 1701, Contests and Diffusions between Athens and Rome.
1707, Productions for 1708.
1708, Par- and Philemon.

tridge's Death. 1708, Sentiments of a Church of England-Man. Vanbrugh's House. Baucis 1709, Project for Advancement of Religion, and Reformation of Manners.

On 27 January 1736, in the Case of *Walthoe v. Walker*, an Injunction was granted by Sir Joseph Jekyll, for printing *Nelson's* Festivals and Fasts; though the Bill sets forth, that it was printed in the Lifetime of *Robert Nelson* the Author ‡, and that he died in January 1714 *. This too was acquiesced under.

‡ It was printed in 1703.
* Prout Preface.

On 5th May 1739, in the Case of *Tonson et al. v. Walker otherwise Stanton*, before Lord Hardwicke, an Injunction was granted, to restrain the Defendants from printing *Milton's Paradise Lost*. The Plaintiffs derived their Title under an Assignment of the Copy from the Author in 1667; which was read. This Injunction was also acquiesced under.

In the Case of *Tonson v. Walker and Merchant* †, before Lord Hardwicke, the Bill was filed 26th November 1751, suggesting that the Defendants had advertised to print "*Milton's Paradise Lost*, " with his Life by *Fenton*; and the Notes of all the former " Editions," of which Dr. *Newton's* was the last. The Bill suggests a Pretence " that the Defendant had a Right." It derives a Title to the Poem, from the Author's Assignment in 1667. That it was published about 1668. And it derives a Title to his Life by *Fenton*, published in 1727; and to *Bentley's* Notes, published in 1732; and Dr. *Newton's*, in 1749. The Answer came in, the 12th December 1751: Wherein the Defendants insisted they had a Right to print their Work in Numbers, and to take in Subscriptions. And they put in their Answer so expeditiously, as to prevent an Injunction before Answer.

† 30th April 1752.

It was intended to take the Opinion of the Court solemnly. The Searches and Affidavits, which were thought necessary to be

made, occasioned a Delay : And no Motion was made till near the End of *April* 1752.

The Injunction was moved for, on *Thursday* the 23d of *April*. Lord MANSFIELD argued it. It was argued at large, upon the general Ground of *Copy-Rights* at *Common Law*.

Lord CHANCELLOR directed it to proceed on the *Saturday* following ; and to be spoken to by One of a Side. Afterwards, it stood over, by Order, till *Thursday* the 30th of *April*; when it was argued very diffusively.

The Case could not possibly be varied, at the Hearing of the Cause. The Notes of the last Edition (Dr. *Newton's*) were *within* the Act : But an Injunction as to *them only*, would have been of little Avail ; and it did not follow, that the Defendants should not be permitted to print what they had a *Right* to print ; because they had attempted to print *more*. For, in the Case of *Pope v. Curl*, 5th *June* 1741, Lord *Hardwicke* enjoined the Defendant only from printing and selling the *Plaintiff's* Letters : There were a great many *more* in the Book which the Defendant had printed, which the *Plaintiff* had no Right to complain of.

If the Inclination of Lord *Hardwicke's* own Opinion had not been strongly with the Plaintiff, he never would have granted the Injunction to the *Whole*, and penned it in the *Disjunctive* ; so that printing the Poem, *or* the Life, *or* *Bentley's* Notes, without a Word of Dr. *Newton's*, would have been a Breach.

The Injunction is not barely to the Selling of *that* Book, of which *Newton's* Notes made a Part ; but to *future printing*.

He might have sent it to Law then, as well as at the Hearing : But he probably foresaw he never should hear of it again. Accordingly, the Parties understood his Way of thinking : And the Defendants acquiesced under the Injunction, and so have made it perpetual ; and would now be guilty of a Breach, if they printed *Milton*.

I do admit that (except from the Order he made, which he saw and penned,) he guarded against being thought finally to determine the Question.

He cited *The Stationers Company v. Partridge*, as an Authority for an Injunction, where the Right was *doubtful*. He observed upon Dr. *Newton's* Notes, either transcribed or colourably abridged, being within the Act : And, according to a Note I have of the Case, he said, " The strongest Authority is what

“ the Judges have said in the Case of *Seymour* (1 Mod.) and in
 “ the Argument of Prerogative-Copies. Distinctions are taken
 “ upon the Ground of the King's Property in *Bibles, Latin*
 “ *Grammars, Common-Prayer* and *Year-Books*; that they were
 “ made and published at the *Expence* of the Crown; *ergo* the
 “ *King's Property*. These Arguments being allowed to support
 “ that Right, *infer* such a *Property existing*.”

That very Point was then depending in this Court, upon a Case sent by himself, in *Baskett v. The University of Cambridge*.

It would not have been agreeable to Lord *Hardwicke's* great Decency and Prudence, to have spoken out *decisively*, upon a general *legal* Right *never decided at Law*; and to have grounded his Opinion upon an Argument which was then a Question *sub Judice*.

The Question upon Literary Property was brought before this Court in the Case of *Tonson v. Collins*; and after two Arguments, was adjourned into the Exchequer-Chamber. I have been informed, from the best Authority, that so far as the Court had formed an Opinion, they all inclined to the Plaintiff. But as they suspected that the Action was brought by Collusion; and a nominal Defendant set up, in order to obtain a Judgment, which might be a Precedent against third Persons; and that therefore a Judgment in Favour of the Plaintiff would certainly have been acquiesced in; Upon *this* Suspicion, and because the Court inclined to the Plaintiff, it was ordered to be heard before *all* the Judges.

Afterwards, upon certain Information received by the Judges, “ that the whole was a Collusion; that the Defendant was *nominal only*; and the *whole Expence* paid by the *Plaintiff*,” they refused to proceed in the Cause; though it had been argued *bona fide*, and very ably, by the Counsel, who appeared for the Defendant. They thought, this Contrivance to get a collusive Judgment was an Attempt of a dangerous Example, and therefore to be discouraged.

The Pendency of this Cause was publicly known: But the Reason of its Discontinuance was not.

Whilst this Question hung in *this* Court, a Doubt arose in *Chancery*: And in the Cases of *Millar v. Donaldson*, and *Osborne v. Donaldson*, * the Injunction was refused, without any Opinion given. Mr. *Murphy* stated Lord *Northington* to have said—“ It
 “ would be Presumption in Me: Therefore I shall say Nothing
 “ as to the Merits.”

* Trinity Vacation, 1765.

Under

Under *these* Circumstances, I think the Injunction was rightly refused: For, whatever his Lordship's own Opinion might be, either Way, it was a becoming Decency, "to *doubt*." And no Judge ever granted such an Injunction to stay Waste, upon a legal Property, and continued it to the Hearing; where the whole Fact was admitted upon the Motion, and he in his own Mind doubted of the Plaintiff's Right. To *what End* should an Injunction be granted? Since the Matter can not appear in a different Light at the Hearing: And it may be sent to Law directly. To stay the Defendant from making a Profit, which he may probably be intitled to, is unjust..

† 9th February, 1709.
11 Ann. B. R.
Lucas 105.

† Stationers
Company v.
Lee, 15 November,
1681.
2 Show. 258.
Stationers
Company v.
Wright, 17
Nov. 1681.

The Stationers Company v. Partridge, for printing Almanacs, is no Instance to the Contrary †. Lord *Cowper* continued the Injunction to the Hearing, upon Grounds which he might think bound him to consider the Plaintiff's legal Right to be clear. Their Patent for printing Almanacs had been tried at Law, and adjudged for them: Injunctions had been decreed in ‡ Chancery; and any further Trial at Law refused, upon solemn Argument. Had not Lord *Cowper* inclined strongly for the Plaintiffs, he never would have enjoined a Work which is *annual*, and serves only for *One Year*.

‡ 2 February, 1710, Lucas 105. No Judgment at Law as to this Case: But the

There is no Report of what passed on the Motion before Lord *Cowper*. But the Question founding in *Prerogative*; and the former Determinations having been *before* the Revolution ‖; Lord *Harcourt* thought it prudent to make a Case for the Opinion of this Court.

Injunction granted by Lord *Cowper* remained. Lord *Parker* seemed, on the Argument, to think "that the Calendar was *not* Part of the Common-Prayer Book."

These Cases in 1765 add great Weight to the Precedents where Injunctions have been granted *after* the Expiration of the Term; because they shew that there was no Doubt before. And I am persuaded that if, in 1752, the Question had been depending in this Court, Lord *Hardwicke* would not have granted the Injunction in the Case of *Tonson v. Walker*; how strong so ever his own Opinion might have been.

Lord *Hardwicke* laid great Stress on the Argument made Use of to support *Crown-Copies*; as *presuming* the Property of Authors. That Argument has since prevailed: And it has been since solemnly adjudged, "that there *are* Copies of which the "King is *Proprietor*."

This

This Court had no Idea that the King, *by Prerogative*, had any Power to *restrain* Printing, which is a Trade and Manufacture; or to grant an *exclusive* Privilege of printing any Book whatsoever; *except* as a Subject might, by Reason of the Copy being *his Property*.

The Court agreed with Mr. Justice *Powell*, who said, in the Case of *The Stationers Company v. Partridge*, "You must shew some *Property in the Crown*, and bring it within the Case of the *Common-Prayer Book*." Mr. *Yorke* argued it upon this Ground.

It is settled, then, "that the *King* is *Owner* of the Copies of all Books or Writings which he had the *sole Right originally* to publish; as *Acts of Parliament*, *Orders of Council*, *Proclamations*, the *Common-Prayer Book*." These and such like are his *own Works*, as he represents the State. So likewise, where *by Purchase* he had the *Right originally* to publish; as the *Latin Grammar*, the *Year-Books*, &c. And in these last Cases the Property of the *Crown* stands exactly on the same Footing as *Private Copy-Right*: As to the *Year-Books*, because the *Crown* was at the *Expence* of taking the Notes; and as to the *Latin Grammar*, because it *paid* for the Compiling and Publishing it.

The Right of the *Crown* to these Books is independent of every *Prerogative* Idea.

The *only Doubt*, as to the Judgment of the House of Lords, upon *Roll's Abridgment* and *Croke's Reports*, is, "that *neither Collection* was made by the *Authority*, or at the *Expence* of the *Crown*;" and "that the *King* had *no Right of Original Publication*; the *Courts of Westminster-Hall* having the *sole Power* to authorize and authenticate the Publication of their *own Proceedings*."

In the Case of *Manley et al. v. Owen et al.* 8th of *April*, 1755, a Bill was filed by some Printers, who had bought from the Lord Mayor the Copy of the Sessions Paper, to injoin the Defendants from printing it. The Lord Chancellor went fully into it, upon Affidavits of the Purchase, and Authority from the Lord Mayor; and that it had always been usual for the Lord Mayor, (being first in the Commission,) to appoint the Printer of the Trials, and to take a Consideration for it. The Lord Chancellor thought the *Right to print* gave the Plaintiffs the *Property*; and granted an Injunction: Which was acquiesced under.

IF an *Author*, by the *Common Law*, has the *sole Right* to make the *first Impression and Publication*, I can not distinguish his Case from *Crown-Copies*, or *Copies* analogous to the *Sessions-Paper*; as *Votes* of the House of Commons, or *Trials* published by Authority.

Suppose a Man, with or without Leave to peruse a Manuscript Work, transcribes and publishes it; it is not within the Act of Queen *Ann*; it is not Larceny; it is not Trespass; it is not a Crime indictable; (The physical Property of the Author, the original Manuscript, remains :) But it is a gross Violation of a valuable Right.

Suppose the Original, or a Transcript, was given or lent to a Man to read, for his own Use; and he publishes it; It would be a Violation of the Author's *Common Law-Right to the Copy*. This never was doubted; and has often been determined.

In the Case of *Webb v. Rose*, 24th of May, 1732, a Bill was filed by the Son and Devisee of Mr. *Webb* the Conveyancer, against the Clerk, for *intending* to print his Father's Draughts. Sir *Joseph Jekyll* granted an Injunction: and it was acquiesced under.

In the Case of *Pope v. Curl*, 5th of June, 1741, Lord *Hardwicke*, upon Motion, granted an Injunction as to *Pope's* Letters to *Swift*: And the Point was fully considered. Lord *Hardwicke* thought, "sending a Letter transferred the *Paper* upon which it " was wrote, and every Use of the Contents, EXCEPT the *Liberty* " and *Profit* of PUBLISHING."

When *express Consent* is not proved, the *Negative is implied* as a tacit Condition.

In this Case too, the Injunction was acquiesced under.

In the Case of *The Duke of Queensbury v. Shebbeare*, 31st of July, 1758, an Injunction was granted, for printing the second Part of Lord *Clarendon's* History. Lord *Clarendon*, the Son, let Mr. *Francis Gwyn* have a Copy. His Son and Representative insisted "he had a Right to *print and publish*." The Court was of Opinion "that Mr. *Francis Gwyn* might make every Use of " it, except the *Profit of multiplying in Print*." It was to be presumed, Lord *Clarendon* never intended that, when he gave him a Copy. The Injunction was acquiesced under: And Dr. *Shebbeare* recovered, before Lord *Mansfield*, a large Sum against Mr. *Gwyn*, for representing "that he had a Right to print."

In the Case of *Mr. Forrester v. Waller*, 13th of June, 1741, an Injunction, for printing the Plaintiff's Notes, gotten surreptitiously, without his Consent, was granted.

From hence, it is clear, that *there is a Time*, when *without* any positive Statute, an Author has a *Property* in the Copy of his own Work, in the *legal* Sense of the Word. *Id quod nostrum est, sine nostro Facto, ad Alterum transferri non potest. Facti autem Nomine, vel Consensus, vel etiam Delictum intelligitur.*

In *this* Case, the Author has *asserted* his Property in the Copy, from the first Moment. *Consent* to leave it open, or give it to the Public, whether express or implied, is a *Fact*: It is not pretended here.

But the Defendant's Counsel insist, "that by the Author's
" *Sale* of printed Books, the Copy *necessarily* becomes open; in
" like Manner as by the Inventor's communicating a Trade,
" Manufacture or mechanical Instrument, the Art becomes free
" to all who have learnt, from such Communication, to exercise it."

The Resemblance holds *only* in *this*.—As by the Communication of an Invention in Trade, Manufacture or Machines, Men are *taught the Art or Science*, they have a *Right to use it*; so all the *Knowledge*, which can be acquired from the *Contents* of a Book, is *free for every Man's Use*: If it *teaches* Mathematics, Physic, Husbandry; If it *teaches* to write in Verse or Prose; If, by reading an Epic Poem, a Man *learns to make* an Epic Poem of his Own; he is *at Liberty*.

But PRINTING is a *Trade* or *Manufacture*. The Types and Prefs are the *mechanical* Instruments: The *literary Composition* is as the *Material*; which always is *Property*. The Book conveys *Knowledge, Instruction, or Entertainment*: But *multiplying Copies in Print* is a quite *distinct* Thing from all the Book communicates. And there is no Incongruity, to *reserve that Right*; and yet convey the *free Use* of all the Book *teaches*.

In 43 *Eliz.* and 21 *Jac.* 1, when Monopolies were the Subject of much Discussion, *Copies of Literary Works* were *protected*; and never thought to be like a Trade, Manufacture, or mechanical Instrument.

But if the Copy *necessarily* becomes open, as a *Gift to the Public*, by the Printing and Publication; it must likewise be so, as to *Crown-Copies*: The *Contrary* of which is now *settled*.

I can

I can not distinguish between the *King*, and an *Author*. I disclaim any Idea that the *King* has the least Control over the Press, but what arises from *his Property in his Copy*.

I am bound by the Opinion of the Court in *Baskett v. University of Cambridge*, to say "that the first Publication and Sale does not, by the Common Law, necessarily, and in Spite of the *Author*, make his Copy open: Though I admit, "an Author's Consent to leave it open may be implied from Circumstances."

2d Question. It remains, to consider the second Question, upon the 8th of Queen *Ann*; though I have already, in Part, anticipated the Argument.

Mr. *Murphy* strongly contended, from the *Amendments* in the Committee of the House of Commons, and from the *Change of the Title*, "that the Parliament meant to take away, or to declare there was no *Property at the Common Law*."

The Sense and Meaning of an Act of Parliament must be collected from what it says when *passed* into a Law; and not from the History of Changes it underwent in the House where it took its Rise. That History is not known to the other House, or to the Sovereign.

Upon the *Face* of this Act, the very *Preamble* strongly implies a Declaration of the *Property at the Common Law*. For, it speaks thus—"Whereas of late," (that is, since the Determination of the Licensing Act,) "the *Liberty taken* by divers Persons, of printing, re-printing, and publishing Books without the Consent of the Authors or Proprietors, to their very great Detriment, and too often to the Ruin of them and their Families;" For preventing, therefore, such Practices for the future, &c.

Now, every Word, almost, in this Preamble is emphatical, and deserves to be remarked upon.

When the Legislature speak of a "*Liberty taken*," could they mean a Claim founded on any *Right*? If they had, they would certainly have so expressed themselves: And then, probably, the Preamble would have run thus—"Whereas Booksellers and divers other Persons have of late *claimed the Right* of Printing and Re-printing, &c.

Now the Word "*Re-printing*" is also observable. For, if the first Printing or Publication was a *Gift* of the Work to the Public, it could be no *Injury* to re-print a *second Edition* without Consent.

But without Consent of *Whom?* The "Author or Proprietor," (in the *disjunctive* :) Thereby clearly pointing out *what Sorts* of Persons are intitled to this Property; the original Author, or his *Assignee*, become also the Proprietor, either by Assignment (in Case of a private Person,) or by Grant from the Crown.

I might, without straining the Construction, suppose that by the Words "too often to the *Ruin* of them and their *Families*," the Parliament *might allude* to Dispositions made by Authors, of their Works, at their Decease, for the Maintenance and Benefit of their Families.

But I choose rather to go to the first Words of the *enacting* Clause—"For preventing, therefore, the *like Practices* for the "future."

Did the Parliament, by the Word "*Practices*," mean to describe the Exercise of a *legal Right*? (which the Publication of Books would be, if there was no Copy-Right?) or did they mean to point out Acts committed in Fraud and *Violation of private Rights*; which this Act was *made to prevent*, and which are properly styled *Practices*?

The Word "*Practices*," is properly applied to the doing of *illegal* Acts; but is improperly and incongruously made Use of to describe the Exercise of *Right*, either strictly legal, or even doubtful.

The Preamble is infinitely stronger in the original Bill, as it was brought into the House, and referred to the Committee.

But to go into the History of the Changes the Bill underwent in the House of Commons—It certainly went to the Committee, as a Bill to *secure the undoubted Property* of Copies *for ever*. It is plain, that Objections arose in the Committee, to the *Generality* of the Proposition: Which ended in securing the Property of Copies for a *Term*; without Prejudice to either Side of the Question upon the *general* Proposition as to the *Right*.

By the Law and Usage of Parliament, a *new* Bill can not be made in a *Committee*: A Bill to *secure* the Property of Authors could not be turned into a Bill to *take it away*. And therefore this is not to be supposed, though there had been *no* Proviso saving their Rights.

What the Act gives with a Sanction of Penalties, is for a *Term*: And the Words "*and no longer*," add nothing to the Sense; any more than they would in a Will, if a Testator gave for Years.

Yet, probably, these Words occasioned the express Proviso being afterwards added ; from the Anxiety of the University-Members, who knew the Universities had many Copies. The University of *Oxford* had published Lord *Clarendon's* History in Three Volumes, but about Five Years before ; and had the Property of the Copy.

Great Stress has been laid by the Counsel for the Defendant, upon the *Change of the Title*, and the Word "*vesting*" being used instead of the Word "*Securing*."

The Restraining of the Provisions of the Bill to a *Term*, necessarily occasioned an Alteration in the Title. "*Securing* for a *Term*" would not import that there was a Common-Law Right beyond the Term : And "*Vesting* for a *Term*" does not import that there is *no* Common-Law Right. If it did, the Title is but once read ; and, if there had been no Proviso, could not control the Body of the Act, which speaks (in the Preamble to the second Section) of the Property intended to be thereby *secured* to the Proprietor. But the Proviso saving the ancient Common-Law Right, is as full as could be drawn—" Provided, that nothing " in this Act contained shall extend, or be construed to extend, " either to prejudice or confirm any *Right* that the said Universities or any of them, or *any Person or Persons* have, or claim " to have, to the printing or re-printing any Book or Copy already printed, or hereafter to be printed." *What* was the Right to be saved, either as to Books *already* printed, or much more as to Books *hereafter* to be printed, but the *Common-Law* Right ?

WITHOUT this Proviso, it might fairly have been argued, that there is nothing in this Act which can prejudice the Property of Authors in the Copy : And every Adjudication upon the Act since it has passed, is an Authority that there never was an Idea that this Act had decided against the Property of Authors at Common Law.

I have avoided a large Field which exercised the Ingenuity of the Bar. Metaphysical Reasoning is too subtle : And Arguments from the supposed Modes of acquiring the Property of Acorns, or a vacant Piece of Ground in an imaginary State of Nature, are too remote. Besides, the Comparison does not hold between Things which have a physical Existence, and incorporeal Rights.

It is certainly not agreeable to natural Justice, that a *Stranger* should reap the *beneficial pecuniary Produce* of another Man's Work.

Work. *Jure Naturæ æquum est, Neminem cum Alterius Detrimeto et Injuria fieri locupletiolem.*

It is wise in any State, to encourage Letters, and the painful Researches of learned Men. The easiest and most equal Way of doing it, is, by securing to them the Property of their own Works. Nobody contributes, who is not willing: And though a good Book may be run down, and a bad One cried up, for a Time; yet sooner or later, the Reward will be in Proportion to the Merit of the Work.

A Writer's Fame will not be the less, that he has Bread, without being under the Necessity of prostituting his Pen to Flattery or Party, to get it.

He who engages in a laborious Work, (such, for Instance, as *Johnson's Dictionary*,) which may employ his whole Life, will do it with more Spirit, if, besides his own Glory, he thinks it may be a Provision for his Family.

I never heard any Inconvenience objected to Literary Property, but that of *enhancing the Price* of Books. *This Judgment will not* be a Precedent in Favour of a Proprietor who is *found* by a Jury to have enhanced the Price. An Owner may find it worth while to give more correct and more beautiful Editions; which is an Advantage to Literature: But his *Interest* will prevent the Price from being unreasonable. A *small* Profit, in a *speedy* and *numerous* Sale, is much larger Gain, than a *great* Profit upon each Book in a *slow* Sale of a *less* Number. V. 12 G. 2.
c. 36.

Upon these Reasons, I am of Opinion, That there is a *Common-Law Right* of an Author to his Copy; that it is not taken away by the Act of the 8th of Queen *Ann*; and that Judgment ought to be for the *Plaintiff*.

Mr. JUSTICE ASTON—This Case has been so often, so fully, and so ably argued; the Citations from History, Decrees, Ordinances, Statutes and Precedents in *Westminster-Hall*, have been stated so accurately in Point of Time and Substance; and the whole Arguments have been gone into so largely by my Brother *Willes*; That I shall content myself with alluding to them, as *now* fully and precisely known, without stating any of them over again (at large,) which I shall have Occasion to take Notice of.

The great Question in this Cause is a *General* One: “How
“ the *Common Law* stands, independent of the Statute of 8 *Ann*.
“ in

“ in respect to an Author's *sole Right* to the Copy of his Literary Productions.”

The material Facts to introduce that Question, found by the special Verdict, are—That the Book intituled “ *The Seasons*,” was an *Original Composition* by *James Thomson*; That it was *printed and published by him for his own Use*, as the *Proprietor* thereof, at several Times, from the Beginning of the Year 1727, to the End of the Year 1729; and was never before printed elsewhere.

That the Plaintiff, in 1729, *purchased* this Work of the original Author and Proprietor for a *valuable Consideration*; that the Plaintiff has from that Time printed and sold this Work *as his Property*; and has ever had a *sufficient Number* of the said Work, for Sale, at a *reasonable Price*.

That the Defendant, *without the Plaintiff's Licence or Consent*, has *published and sold* several Copies of this Work, which were printed without the Plaintiff's Consent. So, taking it affirmatively and negatively, it is expressly found “ That it was *printed without his Consent* :” And it is *not* found, “ that it was ever *made common, or given to the Public*.” Therefore there is no Room for *implying* a Consent, by any Arguments whatsoever.

By this Verdict, then, the *original Property* in this Work, and *Publication of it by the Author*; his *transferring* it to the Plaintiff; the *Identity* of the Work, and of the Copy, (which expressly makes Use of the Name of the Author, and purports to be his Work;) and its *Continuing* in the Author and the Plaintiff respectively, uninterrupted, down to the Defendant's Invasion of that Property, is found.

The Questions therefore are—(1st,) “ Whether an *Author's Property* in his own Literary Composition is such as will *intitle* him, at *Common Law*, to the *sole Right of multiplying* the Copies of it :” Or (2dly,) supposing he *has* a Property in the Original Composition, “ Whether the *Copy-Right*, by his *own Publication* of the Work, is necessarily *GIVEN away*, and his *Consent* to such Gift *implied by Operation of Law*, manifestly *against his Will, and contrary to the Finding of the Jury* ;” Or (3dly,) “ *TAKEN away* from him, or restrained, by the *Statute of Queen Ann.*”

It has been ingeniously, metaphysically and subtilly argued on the Part of the Defendant, “ That there is a *Want of Property* in the *Thing itself*, wherein the Plaintiff supposes himself to

“ be injured ; and consequently, if there is *no Property or Right*,
 “ there is *no Injury or Privation of Right*.”

The Plaintiff's supposed Property has been treated as quite *ideal and imaginary*; not reducible to the Comprehension of Man's Understanding; not an *Object* of Law, nor *capable* of Protection.

As *all the Objections* to this Property or Right being *allowed or protected by the Common Law*, rest entirely upon Arguments which endeavour to shew “ that such Allowance or Protection is “ *contrary to right Reason and natural Principles*,” the only Grounds of Common Law *originally* applicable to this Question; —I think fit (however abstract they may seem) to consider certain great Truths and sound Propositions; which we, as rational Beings; we, to whom Reason is the great Law of our Nature; are laid under the Obligation of being *governed by*; and which are most ably illustrated by the learned Author of *The Religion of Nature Delineated*; that is to say—

“ That *Moral Good and Evil* are *coincident* with *Right and Wrong* :” For, that can not be good, which is wrong; nor that evil, which is right*. “ That *right Reason* is the *great Law* * P. 20. § 1.
 “ *of Nature*; by which, our Acts are to be adjudged; and according to their Conformity to this, or Deflexion from it, are to be called *lawful, or unlawful*; good, or bad.†” “ That † P. 23. § 5.
 “ *whatever* will bear to be *tried* by that Reason, is *right*; and P. 126.
 “ that which is *condemned* by it, is *wrong* ‡.” “ That to act according to *right Reason*, and to act according to *Truth*, are in † P. 23.
 “ Effect the *same Thing* §.” § Ibid.

Then (speaking of Truths respecting Mankind in general, antecedent to all human Law*) — “ That Man being capable of * P. 127. § 6.
 “ distinct Properties in Things which he only, of all Mankind, can call *his* ;” he says—

“ The *Labour* of *B*. can not be the *Labour* of *C* ; because it is the Application of the Organs and Powers of *B*, not of *C*, to the Effecting of something: And therefore the *Labour* is as much *B*'s, as the *Limbs* and *Faculties* made Use of are *his*.”

Again, “ The *Effect* or *Produce* of the Labour of *B* is not the *Effect* of the Labour of *C*: And therefore *this Effect or Produce* is *B*'s, not *C*'s. It is as much *B*'s, as the *Labour* was *his*, not *C*'s; because, what the Labour of *B* causes or produces, *B* produces *by his* Labour; or it is the Product of *his* Labour. Therefore it is *his*; not *C*'s, or any Other's. And if *C* should

† P. 127, 128. “pretend to any *Property* in that, which *B* only can truly call
“his, he would act *contrary to Truth*†.”

† Prop. 8. § 6. Pa. 134. “That to deprive a Man of the Fruit of his own *Cares* and
“*Sweat*; and to enter upon it,” [he is here speaking of the Cul-
tivation of *Land*s,] “as if it was the Effect of the *Intruder*’s
“*Pains* and *Travel*; is a most manifest *Violation of Truth*: It is
“asserting, in *Fact*, that to be *HIS*, which can not be *HIS*†.”

§ Prop. 10. § 6. Pa. 136. There is, then, such a Thing as *Property*, founded in *Nature*
and *Truth*; or, there are Things, which *One Man* only can, con-
sistently with *Nature* and *Truth* call *his* §: As Proposition 2, 8,
9, demonstrate.

* Pa. 136. And those Things, which *only One Man* can truly and properly
call *his*, must remain *his*, till he agrees to part with them by *Com-
pact* or *Donation*: Because no Man can deprive him of them
without his *Approbation*; but the *Depriver* must use them as
his, when they are not *his*, in Contradiction to *Truth*. For,
“to have the *Property*” of any Thing, and “to have the *sole*
“*Right* of using and disposing of it,” are the *same* Thing: They
are equipollent Expressions*.

† Pa. 137. *Property*, without the *Use*, is an empty Sound. He who *uses* or
disposes of any Thing, does by that declare it to be *his*; because
this is all that he whose it really is, can do. *Borrowing* and *Hir-
ing* afford no Objection to this: For he uses what is *his own* for
the *Time* allowed; and his doing so is only in *One of those Ways*,
in which the true *Proprietary* disposes of it†.

FROM this *Great Theory of Property*: It is to be collected—

† Pa. 137. Prop. 15. That a Man may have *Property* in his *Body*, *Life*, *Fame*, *La-
bours*, and the like; and, in short, in any Thing that can be
called *his*†. That it is incompatible with the *Peace* and *Happi-
ness* of *Mankind*, to violate or disturb, by *Force* or *Fraud*, his *Pos-
session*, *Use* or *Disposal* of those Rights; as well as it is against
the Principles of *Reason*, *Justice* and *Truth*. That it is what
every Man would think unreasonable in his own Case. That a
partial Disposition, by the true *Proprietor*, of a Thing that is *his*,
is not to be carried beyond the *Intent* and *Measure* of the *Proprie-
tor’s Assent* and *Approbation* in that Behalf; whether it be the
Case of *borrowing*, *hiring*, or a *Compact* of any other Sort: Of
† Post 2342. which I shall take further Notice, when I speak of *Publication*†.

I shall in the next Place observe, That the written Definitions
of *Property*, which have been taken Notice of at the Bar, are, in
my Opinion, very inadequate to the Objects of *Property* at this
Day.

Day. They are adapted, by the Writers, to Things in a *primitive* (not to say *imaginary*) State; when all Things were in *common*; when that Common Right was to be *devested* by some Act to render the Thing privately and *exclusively* a Man's own, which, before that Act so done to separate and distinguish it, was as much *Another's*.

These Definitions too, when examined, will be found *principally* to apply to the *Necessaries of Life*, and the *grosser Objects of Dominion*, which the immediate natural Occasions of Men called for: And for that Reason, the Property, so acquired by Occupancy, was required to be an Object *useful to Men*, and capable of being *fastened on* §. Enough was to be left for Others. *As much* as any One could use *to an Advantage of Life before it spoiled*, so much he could fix a Property in: Whatever was *beyond this*, was more than his Share, and belonged to Others*. 'Tis plain too, that the Definition is so understood by Grotius†, when he says “*Jus in Res inferioris Naturæ Deus humano Generi in-*”
“*divisim contulit. hinc factum, quod quisque Hominum ad suos Usus*”
“*arripere posset, quod vellet; et quæ consumi poterant, consu-*”
“*mere.*”

§ Pufendorf, Lib. 4. c. 5. § 1.

* Locke, Vol. 2. Book 2. c. 25. § 27, 31.
† Lib. 2. § 2.

'Tis evident, surely, that these Definitions give a Sort of Property little superior to the legal Idea of a Beast-Common,—the Bit of Mouth *snatched*, or taken for *necessary Consumption to support Life*.

Thus Great Men, ruminating back to the *Origin* of Things, lose Sight of the *present* State of the World; and *end* their Inquiries at that Point where they should *begin* our Improvements.

But *distinct Properties*, says Pufendorf‡, were not *settled* at the same Time, nor by one single Act, but *by successive Degrees*; nor in all *Places* alike: But Property was *gradually* introduced, according as either the Condition of Things, the Number and Genius of Men required; or as it appeared requisite to the common Peace.

‡ Lib. 4. c. 4. pa. 367. § 6. Pa. 377. § 14.

SINCE those supposed Times, therefore, of universal Communion, the *Objects* of Property have been much *enlarged*, by Discovery, Invention, and Arts.

The Mode of *obtaining* Property by Occupancy has been *abridged*; and the Precept “of abstaining from what is *Another's*,” enforced by Laws.

THE

THE RULES attending Property must *keep Pace* with its Increase and Improvement, and must be *adapted to every Case*.

A DISTINGUISHABLE *Existence* in the Thing claimed as Property; an ACTUAL VALUE in that Thing *to the true Owner*; are its *Essentials*; and not less evident in the present Case, than in the immediate Object of those Definitions.

And there is a material *Difference* in Favour of *this* Sort of Property, from that gained by *Occupancy*; which before was common, and *not yours*; but was to be rendered so by some Act of your Own. For, THIS is *originally* the *Author's*: And, therefore, *unless* clearly rendered common by his own Act and full Consent, it ought *still to remain his*.

* Pufendorf,
Lib. 4. c. 5.
Pa. 378.
Not. 1.

The UTILITY of the Thing to Man, required by the Definition * to make it an Object of Property, has been long *exploded*; as appears from *Barbeyrace's* Note upon this very Passage; where it is held an *unnecessary and superfluous Condition*.

Things of *Fancy*, *Pleasure* or *Convenience* are as much *Objects of Property*; and so considered by the *Common Law*: *Monkeys, Parrots*, or the like; in short any Thing *merchandizable* and *valuable*. 12 H. 8. 3. a. b. &c. Bro. Abr. Tit. "Property," pl. 44. *Comyns Digest*, 1 Vol. pa. 602.

The best Rule, both of Reason and Justice, seems to be, "to assign to every Thing *capable* of Ownership, a *legal and determinate Owner*."

A Capacity to fasten on, not the true only Definition: But, A Capacity to be distinguished.

For, the *Capacity to fasten on*, as a Thing of a *Corporeal Nature*, being a *Requisite in every Object of Property*, plainly partakes of the *narrow and confined Sense* in which Property has been defined by Authors in the *original State* of Things. A *Capacity TO BE DISTINGUISHED* answers every End of *Reason* and *Certainty*; which is the great Favourite of the Law, and is all that Wisdom requires to secure their Possessions and Profits to Men, and to preserve the Peace.

* Pope v. Curl.
Webb v. Rose. Ld.
Clarendon's Works.
Forrester v. Waller. D. of Queensbury v. Shebbeare.

It is settled and admitted*, and is not now controverted, but "that Literary Compositions, in their *original State*, and the *Incorporeal Right of the Publication* of them, are the *private and exclusive PROPERTY* of the Author; and that they *may ever* be retained so; and that if they are ravished from him *before Publication, Trover or Trespass* lies."

I should be glad to know, then, in such a Case where the Property is admitted, “*How the Damages ought to be estimated by a Jury?*”——Should they *confine* their Consideration to the Value of the *Ink and Paper?*—Certainly *not*: It would be most reasonable, to consider the known Character and Ability of the Author, and the Value which his Work (so taken from him) would produce by the Publication and Sale. And yet, *What* could that *Value* be, if it was true, that the Instant an Author published his Works, they were to be considered by the Law as *given to the Public*; and that his private Property in them *no longer existed?*

The present Claim is founded upon the *Original* Right to this Work, as being the *mental Labour* of the Author; and that the *Effect and Produce* of the Labour is *his*. It is a *personal, incorporeal* Property, *saleable and profitable*; it has *Indicia certa*: For, though the Sentiments and Doctrine may be called *ideal*, yet when the same are communicated to the Sight and Understanding of every Man, by the Medium of *Printing*, the Work becomes a DISTINGUISHABLE Subject of Property, and *not totally destitute of Corporeal Qualities*.

Now, *without* Publication, 'tis useless to the Owner; because without *Profit*: And PROPERTY, *without the Power of Use and Disposal*, is an empty Sound†. In *that* State, 'tis lost to the Society, in Point of Improvement; as well as to the Author, in Point of Interest. + V. ante, Pa. 2338.

PUBLICATION therefore is the necessary Act, and only Means, to render this *confessed Property useful to Mankind*, and *profitable to the Owner*: In *this*, they are *jointly* concerned.

Now, to construe this only and necessary Act to make the Work useful and profitable, to be “*destructive, at once, of the Author's confessed original Property, against his express Will,*” seems to be quite harsh and unreasonable: Nor is it at all warranted by the Arguments derived from those *Authors* * who advance “*That, by the Law of Nature, Property ends, when cor-* * Bynker- shook, &c. *poral Possession ceases.*”

For *Earbeyrac*, in his Notes on *Pufendorf*†, clearly shews + Lib. 4. c. 6. Not. 1. that the Right acquired from taking Possession does *not* cease when there is no Possession; That *perpetual* Possession is *impossible*; That the above Hypothesis would reduce Property to *Nothing*; That the *Consent of the Proprietor* to that Renunciation ought to *appear*: For, as *Possession* is nothing else but an *indisputable Mark of the Will* to retain what a Man has seized; so, to au-

thorize us to look upon a Thing as abandoned by him to whom it belonged, because he is *not* in Possession, we ought to have *some other Reasons* to believe he has renounced his personal Right to it.

Wherefore, says he, though we may presume this, in respect to those Things which remain such as Nature has produced them; yet, as for *other* Things which are the *Fruits of human Industry*, and which are done with great *Labour and Contrivance* usually,—It cannot be doubted but every One would preserve his Right to them, till he makes an open Renunciation.

Now there is *no open Renunciation* of the Property in the present Case; but a *constructive* One only, barely from *Publication*. “RENUNCIATION, or not,” is a *Fact*. It is *not found*; and ought not to be *presumed*. But the Contrary is found: ’Tis found here “that it is *against his express Will*.”

But it was said at the Bar, “if a Man *buys* a Book, it is his *own*.”

What! is there no Difference betwixt selling the PROPERTY *in the Work*, and only *One* of the *Copies*? To say, “*Selling* the “Book conveys *all* the Right,” begs the Question. For, if the *Law* protect the Book, the Sale does *not* convey away the Right, *from the Nature of the Thing*, any more than the Sale conveys it where the *Statute* protects the Book.

The Proprietor’s *Consent* is not to be carried *beyond* his manifest Intent. Would not such a Construction extend the *partial* Disposition of the true Owner *beyond his plain Intent and Meaning*? Which, from the Principles I have before laid down, is no more to be done in *this* Compact, than in the Case of *Borrowing* or *Hiring**.

* V. ante,
Pa. 2338.

Can it be conceived, that in purchasing a Literary Composition at a Shop, the Purchaser ever thought he bought the Right to be the *Printer and Seller* of that specific Work? The *Improvement, Knowledge, or Amusement*, which he can derive from the Performance, is all his *Own*: But the *Right* to the Work, the *Copy-Right* remains in *him* whose Industry composed it.

The Buyer might *as truly* claim the *Merit of the Composition*, by his Purchase, (in my Opinion,) as the Right of *multiplying the Copies* and reaping *the Profits*.

The *Invasion* of this Sort of Property is as much against every Man’s Sense of it, as it is against *natural Reason* and *moral Rectitude*. It is against the Conviction of every Man’s own Breast, who

who attempts it. He *knows* it, not to be his own; he *knows*, he injures another: And he does not do it for the Sake of the Public, but *malâ Fide et Animo Lucrandi*.

The *artificial Reasoning*, drawn from refined metaphysical Speculation, is all on *that* Side of the Question. It is arguing by *Analogy*, only, to Things of a *different Nature*—"That it is not *tangible*:" And the like.

The Law of *Nature and Truth*, and the Light of *Reason*, and the *common Sense* of Mankind, is on the *other* Side: For, *Jus Naturæ propriè est Dictamen rectæ Rationis, quo scimus quid turpe, quod honestum, quid faciendum, quid fugiendum sit*.

If the above Principles and Reasoning are just, why should the *Common Law* be deemed so narrow and illiberal, as not to *recognize* and receive under it Protection a Property so circumstanced as the present?

THE COMMON LAW, now so called, is *founded* on the Law of Nature and Reason. Its *Grounds, Maxims and Principles* are *derived* from *many different Fountains*, (says Judge Dodderidge *, in his *English Lawyer*;) from natural and moral Philosophy, from the Civil and Canon Law, from Logic, from the Use, Custom and Conversation among Men, collected out of the general Disposition, Nature and Condition of Human Kind.

* P. 154 to 161. Doctor and Student passim avows the same, p. 6, 14, 51. Pa. 161.

He states the several Maxims and Grounds, under the particular Heads, from whence they are derived: And he places under the Head of *Moral Philosophy* a Maxim of the Common Law, as borrowed from thence—*Quod tibi fieri non vis, alteri ne feceris*.

"That what is now called the *Common Law of England* was *made up* of a Variety of *different Laws*, enacted by the several *Saxon Kings* reigning over distinct Parts of the Kingdom; which several Laws, affecting then only *Parts* of the *English Nation*, were *reduced into one Body* and *extended* equally to the *whole Nation* by King *Alfred*;" appears from *Fortescue's Preface* *; and that it is therefore properly called the *COMMON LAW of England*; because it was done "Ut in *Jus commune totius Gentis* transiret."

* P. 6, 8.

But it had an *ancienter Original* than *Edward the Confessor*; and was at first called the *Folcright* or *People's Right*; (for it is plain it could not be called the *Common Law* in *Edward the Confessor's Time*, for then they spoke *Saxon*; nor in *William the Conqueror's Time*, for then they spoke *French*;) But it received this Name, when the Language came to be altered. And Lord

Coke (1 Inst. 142.) says, "the Common Law is sometimes called *Right, Common Right, Common Justice*." Which Observations I make upon its *general Name*, to free it from any Imputation of there being any Thing restrictive of its Efficacy in the Name itself; or that it is not equally comprehensive of, and co-extensive with these Principles and Grounds from which it is derived.

The COMMON Law, so founded and named, is *universally comprehensive*—*Jubens honesta; Prohibens contraria*†: Its Precepts are, in respect to Mankind,—"*Honestè vivere; Alterum non lædere; Suum cuique tribuere*‡."

† Brañton,
Lib. 1. c. 3.
‡ Justinian,
Inst. 1. 1, 3.

In respect to the several *Species* of Property; though the *Rules* touching them must ever have been the same, yet the *Objects* of it were not all at once known to the Common Law, or to the World: And many have been *disputed*, as not being *Objects* of Property at Common Law, which yet are *now established* to be such; as, Gunpowder, &c, &c, &c.

In the Year-Book of 12 H. 8. f. 3. a. b. Great Dispute was made, (*upon the Footing of Property too*), "Whether an Action would lie for taking away a *Blood-Hound*." The Arguments used against it were such as have, amongst others, been used upon the present Occasion; viz. That it was of *no Value* nor *Profit*; but for *Pleasure*. That *Felony* could not be committed of it; consequently, *not Trespass*. That when the Dog was out of the Party's *Possession*, he *ceased* to have any Property in him. That a Dog was *not tickleable*; would *not pass* by a Grant of *omnia Bona*. That *Replevin* or *Detinue* would not lie of a Dog.

N. B. See some of these Arguments, (which I have put all together, for Convenience,) in the *subsequent Cases* in *Cro. Eliz.* and *Owen*.

But *upon what Principles* did the Court determine "that the Action lay?" Upon *these*—"That where any *Wrong or Damage* is done to a Man, the Law gives him a Remedy. That if it was only a Thing for Pleasure, yet it was *sufficient*; as a *Pop-pinjay**, which sings and refreshes my Spirits. That it was *not lawful*, to take him *against my Will*—*Hoc facias Alteri, quod Tibi vis fieri*—And that though it be not *Felony*, yet *Trespass* well lies: For, if a Man cut my Trees, and take them; 'tis *Trespass*, though not *Felony*."

* Property preserved even in a Thing so trifling.

Brooke, in his Abr. of this Case, (Tit. "Property," pl. 44.) says, "The Reason why this Property was not liable to the *other Remedies*, or *Charges*, or *Modes of Conveyance* there mentioned, is,

“ because it was a *Property not properly known*: And yet *Trespass*
 “ would lie.”

From this Case, it is clear to me, that though the above was *such a Species* of Property then not properly known to, or at least *not established by Precedent* at the Common Law; yet that the *Novelty* of the Question did *not* bar it of the *Common-Law Remedy and Protection*. That it was sufficient, *that it was a* DISTINGUISHABLE Property; that it had a DETERMINATE OWNER. That its being a Matter of *Pleasure or Profit*, to the Owner, made *no Difference*. That it was *not necessary*, that every Species of Property should be liable to all the *same* Circumstances, Incidents or Remedies. That the Person invading it, had *Nothing to do with it*. And that he erred against the Rules of *Morality and Justice*, in *disturbing Another's Possession or Pleasure*.

One would have thought, after this Case, that Question would have rested. But in 31 *Eliz. Owen* 93. *Cro. Eliz.* 125. *Ireland v. Higgins*, It came on again, in an Action for a *Greyhound*; wherein, upon a Demurrer to the Declaration, it was argued for the Defendant, “ That there was no Consideration to maintain
 “ the Assumpsit: *For that the Plaintiff was out of Possession of the*
 “ *Dog*; and being *feræ Naturæ*, he had lost his Interest in it, and
 “ *had no Remedy for it*.” But the Action was held maintainable; though the like Arguments were used as in the Year-Book.

The COMMON Law being founded on such Principles as have been laid down, and which are avowed by the above Authorities; the Remedy by *Action upon the Case* is suited to every Wrong and Grievance that the Subject may suffer from a *special Invasion* of his Right: For this Sort of Action *varies*, says Lord Coke†, † 8 Co. 48. a. according to the *Variety of the Case*.

That the *Invasion* of the *Plaintiff's Property* in the present Case is the *proper Subject* of *such an Action*; That it may be *maintained at Common Law*, without contradicting any Maxim of its own, any Statute of the Realm, or any Principle of natural Justice; and That it may well undergo a Constitutional Mode of *Trial by Jury*, so as to answer every End of Certainty and Justice; seems to me without any solid Objection: For, I confess, I do *not know*, nor can I comprehend *any Property more emphatically a Man's Own*, nay, *more incapable of being mistaken, than his literary Works*. And if an Author has really and openly abandoned them, *that might be found*; or the Plaintiff *on such Proof*, would fail in his Action. And there may be many *Circumstances* properly *inquirable* in an *Action of this Sort*; viz. “ if the Composition be given to the Public, *made common*, abandoned;” “ if published *without a Name*;” “ if *not claimed*;” “ if *allowed to*
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“ be pirated, *without Objection*”—All this is *Evidence* to the Jury of the *Gift to the Public* ; and not at all above the Comprehension of a common Jurymen ; nor so ideal, but that full and satisfactory Evidence may be given of the substantial Work or Composition, and of its original or derivate Ownership. So, an Author being *unknown*, or *long since dead* ; *no Assignment* of the Property ; *none*, or *unknown Representatives* ; the Edition *long deserted*, &c ; are all *Circumstances* that may be brought into *Proof*.

But all the Difficulty lies on the Plaintiff: He is to *make out his Right*, and the *Injury done to his Property*.

In the present Case, there is *no Chasm* or Interval of Time when the Right to this Work can be said to be *renounced*, from the original Publication to the present Time ; *unless* the *bare Act of Publication* itself is to be called so. And if *that alone* was to prevail against a *private Author*, why should not *prerogative Property*, founded on the *same Ground* of Argument as the *general Property* of Authors in their Works, be *liable* to the *same free and universal Communion* ? For I know no Difference, in *that Respect*, between the Rights of the *Crown* and the Property of the *Subject*.

“ That there is any *Hardship* put upon the Defendant in this Case, for that he may err innocently,” I see no just Grounds for saying ; because the Defendant *knows* the Work is *not his*, and that he had *no original Right* to publish it. At his *Peril*, therefore, he undertakes to give the Edition ; he does it with his *Eyes open* : And “ whether it was Property renounced, or “ not,” it was *his Business* to *inquire*.

Upon the Whole, I think an *Author's Property in his Works*, and the *Copy-Right*, is *fully and sufficiently ESTABLISHED* ; because it is admitted to be *Property in his own Hands*, and that he has the *ORIGINAL Right of first publishing* them.

Further, That this Idea of an Author's Property has been so long entertained, that the *COPY* of a *Book* seems to have been not familiarly only, but *legally used* as a *technical Expression* of the *Author's SOLE Right of printing and publishing* that Work : And that *these Expressions*, in a Variety of Instruments, are *not* to be considered as the *Creators or Origin* of that Right or Property ; but, as speaking the Language of a *known and acknowledged Right* ; and, as far as they are active, *operating in its Protection*.

This appears from the Citations used at the Bar, from History, Acts of State, Proclamations, and Decrees in the Star-Chamber,

Chamber, particularly in 1586 and 1637, and down to the Year 1640; Also from the Clauses in Ordinances and Statutes antecedent to the Statute of *Queen Ann*; and from the Expressions used in that Statute too, which speaks with Precision of this Sort of Property as a *known Thing*; and which, with as much Accuracy, supposes the *Licence and Consent* of the Author or Proprietor *necessary* to the printing of their Works.

This Opinion too is strongly supported by the *concurrent Sense of Judges*, to be collected from the Expressions they have made Use of in Cases at Common Law, at different Periods of Time. As in *Skinner*, “that the Statute of *Car. 2.* did not give the *Right*, but the *Action*.” In 1 *Mod.* 257—where *Pemberton* speaks of a Grant to print, “*How far it should stand good against those who claimed a Property paramount the King's Grant:*” And there too, *the Making Title to a Copy* is mentioned.

The Court too, in speaking of Additions to the Almanac by Prognostication, says, “They alter the Case no more than if a Man should *claim a Property in another Man's Copy*, by Reason of some inconsiderable Additions of his Own.”

In *Pender v. Bradyl* also, in an Action for printing the Pilgrim's Progress, the Plaintiff is averred to be “*the TRUE Proprietor*.”

In *The Stationers Company v. Partridge*, It seems that the CROWN's sole or original Right to publish was FOUNDED in Property. In 3 *Mod.* 75—that the Property vests in the King, where no individual Person can claim a Property in the Thing. This Argument shews that *Pemberton* thought he could rest the Case and the Right of the Crown upon Property only: For, here, to get at such Ground, the Argument is far fetched and misapplied; because in a Case of this Kind, if there is no private Property, it would not belong to the King, but be Common, like Animals *feræ Naturæ*, or Air, Water, or the like.

And the Case of *Baskett* and *The University of Cambridge* is a solemn well-considered Determination upon the Ground of the original Right of Publication belonging to the King.

So that though there is no precise Decision in the Point, yet this long uniform Idea of such an Object of Property at Law deserves the greatest Attention and Weight; where every Principle of Reason and Justice concurs with deciding in Favour of the Property.

It was compared to throwing Land into a Highway. The Intent there precedes the Right: As it is given, so it may be used.
But

But the *Intent* circumscribes the Right. *Feed* it with *Cattle*; and an Action lies: Then, you *exceed* the Purpose of the Gift, and become a *Wrong-Doer*.

But besides this, the uniform Conduct of the Court of CHANCERY since the Statute, in entertaining Bills of Injunction *without Regard* to an *Entry* being made of the Work pursuant to the Statute, or to the Suit's being brought within the *Limitation* of the Three Months, or within the *Term* given for its Protection, shews, that *that* Court must necessarily have proceeded under the like Idea of a Right *antecedent to*, and *not newly created* by the Statute: For, the Act could not mean to give a Right of Property, and an Action at Law or a Bill in Equity incident thereto, where the *Condition* of Entry is *not* complied with. The Declaration, "That the Author shall have the sole Right of printing the Book," must be on the *Terms and Conditions* in the Act. The Consequences of an Action and Injunction are *worse* than the *Penalties*: And One Reason given by the Act, for *requiring the Entry*, is, "That Persons may not offend through *Ignorance*." That Circumstance of *Notoriety* was required by all the Licencing Acts and Ordinances.

Second Question.

As to the Second Question— "Whether the *Copy-Right* is *given away* by the Author's *Publication*—"

I have already spoken upon this Head collectively with the first; and shall only add, That I am of Opinion that the Publication of a Composition does *not* give away the Property in the Work; but the Right of the Copy *still remains* in the Author; and that no more passes to the Public, from the free Will and Consent of the Author, than an unlimited Use of every Advantage that the Purchaser can reap from the *Doctrine* and *Sentiments* which the Work contains. He may *improve* upon it, *imitate* it, *translate* it; *oppose* its Sentiments: But he buys *no Right* to publish the identical Work.

That the Comparison made betwixt a *literary* Work and a *mechanical* Production; and that the Right to *publish* the *One*, is as free and fair, as to *imitate* the *Other*; carries no Conviction of the Truth of that Position, to my Judgment. They appear to me *very different in their Nature*. And the Difference consists in *this*, That the Property of the Maker of a *mechanical* Engine is confined to that *individual Thing* which he has made; That the Machine made in Imitation or Resemblance of it, is a *different Work* in *Substance*, *Materials*, *Labour* and *Expence*, in which the Maker of the original Machine can not claim any Property; for it is *not his*, but *only a Resemblance* of his: Whereas the *re-printed Book* is the *very same Substance*; because its *Doctrine* and
Sentiments

Sentiments are its *essential* and *substantial* Part; and the *Printing* of it is a *mere mechanical Act*, and the Method only of *publishing* and *promulging* the Contents of the Book.

The *Composition* therefore is the *Substance*: The *Paper, Ink, Type*, only the *Incidents or Vehicle*.

The *VALUE* proves it. And though the Defendant may say “Those *Materials* are mine,” yet that can not give him a Right to the *Substance*, and to the *multiplying of the Copies* of it; which, (on whose Paper or Parchment soever it is impressed,) must *ever be invariably the same*. Nay, his *Mixing*, if I may so call it, his such like Materials with the Author’s Property, *does not* (as in common Cases) render the Author’s Property *less distinguishable* than it was *before*: For, the *identical Work or Composition* will *still appear*, beyond a Possibility of Mistake.

The imitated *Machine*, therefore, is a *new* and a *different* Work: The *Literary Composition*, printed on another Man’s Paper, is still the *same*.

THIS is so evident to my *own* Comprehension, that the utmost Labour I can use in *Expressions*, can not strengthen it in my own Idea.

Supposing then that the Author *has* such Property, and that he *has not* given away or abandoned it by *Publication*—

The next Question is,—“Whether the *Statute of Queen Ann* Question on 8 Ann. “has *taken it away*; or so *restrained* it, that an Author’s Right “to the Copy *expires* with the Term limited by that Statute for “its Protection.”

Whoever contends “that this Kind of Property is not known “to the *Common Law*,” must also contend “that *this Statute* “creates a new Kind of Property, which it *vests for a Time only*, “in the Authors and their Assigns, under the *Conditions and Limitations* specified in the Act.”

It must be contended too, to support the Arguments that have been used, “that the Legislature had in View and intended “to *abolish* or *suspend for a Time* (if the Terms required by “the Act were complied with) *that Right of universal Commu-* “*nion*, which the *Publication* of any Work gave *indiscriminately* “to all Mankind; or (in case the Terms of the Act were not “complied with,) that such Right might be *still freely exercised*, “without Offence.”

THE IDEA of such a *common Right* does *not* appear to have *existed* at the Time of the Statute, or to be *warranted* by any Authority.

The Preamble of the Act *reproves* the LIBERTY of late frequently *taken*, of printing Books and Writings *without* the Consent of the Author or Proprietor; and treats it *as an* ABUSE of a Right, *not* as an Act done in *Affertion* of any Common-Law Right which the Statute intended to put only a *temporary* Restraining to: For, the Act declares it to be done “To the *Detri-ment* of the *Proprietors*, and to the *Ruin* of their Families.”

THIS is a *very different Language* from the Arguments now used, “That there is *no Injury*, *no Privation of Right*, for *Want of Property* in the Thing itself.” And yet the Property *now*, and *then*, was exactly the *same*.

The *particular Wording* of the *Enacting Clause* is very material; as it precisely adopts the identical Expressions anciently used in the Decrees, Ordinances and Statutes referred to; alike speaking of the Right of Authors, as a *known, subsisting, transferrable* Property.

I am not satisfied with saying “that such Right may be *implied* from the Words”—They are *so express*, that the Legislature *can not* be otherwise understood, than as speaking of a *known* Property. “The *Copy* of the Book,” “the *Title* to the *Copy*,” is a *technical Recognition* of the Right, in the Words of the Act.

This Act was brought in at the Solicitation of *Authors, Booksellers, and Printers*, but principally of the two Latter; *not* from any Doubt or Distrust of a just and legal Property in the Works or Copy-Right, (as appears by the Petition itself, Pa. 240. Vol. 16. of the Journals of the House of Commons;) but upon the *Common-Law Remedy being inadequate*, and the *Proofs difficult*, to ascertain the Damage *really* suffered by the injurious Multiplication of the Copies of those Books which they had bought and published. And this appears from the Case they presented to the Members at the Time.

All the *Sanction* they could obtain, was a Protection of their Right, by inflicting *Penalties* on the Wrong-Doer.

The Statute extends to *no Case* where the *Title to the Copy* is not entered in the Register of the Stationers Company: Which Entry is necessary to ascertain the Commencement of the Term, during

during which this Protection by *Penalties* is granted. If that Requisite is neglected, the Benefit of the *Statute* does not attach.

The General Case, of Authors who do *not* comply with this, is *still open*; and of those too that *do*, who do not sue *within Three Months*.

For, if a Statute gives a Remedy in the *Affirmative*, (without a Negative, expressed or implied,) for a Matter which was *actionable before by Common Law*; the Party may *sue at Common Law*, and *wave* his Remedy by Statute, if he pleases. 2 *Inst.* 200. 2 *Roll.* 49.

A *Negative* can not be implied here. The Question wholly depends upon the Point, “Whether it be a Right *newly created*, “or not?” If it *was*, then it would receive its Birth, Duration and Remedy *from* the Statute; and *no other* Remedy could be pursued.

But if there was an *antecedent Common-Law Right*, the *Common-Law Remedy* will *remain*; and the *Statute-Remedy* can only be made Use of, by observing the particular *Conditions* which the Act prescribes.

The *Preamble* of the Statute, as it was *originally brought in* and went to the Committee, was the *fullest Assertion* of the legal Property and undoubted Right of Authors at *Common Law*, that could be: And there was *no saving Clause* at all, in the Act.

When that florid Introduction was *abridged*, 'tis most probable, as the Fact appears, that a *Saving-Clause* was guardedly *inserted*.

The *Universities* had considerable *Copy-Rights*. Lord *Clarendon's History* was but *lately* published by the University of *Oxford*: I believe the 3d Volume did not come out till 1707. They came out at different Times.

The *Proviso*, however, is *general*—“That Nothing in this “Act contained, shall extend either to *prejudice* or *confirm* any “Right that the said Universities or any of them, or any *Person* “or *Persons* have, or claim to have, to the printing or reprint- “ing any Book or Copy already printed, or hereafter to be “printed.”

If there was not a Common-Law Right *previous* to this Statute, *what* is this Clause to *save*? Not a Right of *publishing*, to throw it into *universal Communion* as soon as it comes out. That was no more worth while, than the *Purchasing a Copy* seems to
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me to be, if it is left *unprotected* by the Law, and *open* to every Piratical Practice.

It has been said, "that this was inserted, That the Rights " which the Universities or Others had, *under Letters Patent*, " might not be affected."

There can be no Ground for *this*: For, the Act does not at all meddle with *Letters Patent*, or enact a Title that could either *prejudice* or *confirm* them.

THIS PROVISIO seems to be the Effect of *extraordinary Caution*, That the Rights of Authors, at *Common Law*, might not be affected: For, if it had *not* been inserted, I apprehend clearly, they could *not* have been taken away by *Construction*; but the *Right* and the *Remedy* would still remain, unaffected by the Statute.

The repeated Practice of the *Court of CHANCERY*, in entertaining a Jurisdiction by Bills of *Injunction*, and for *Relief*, (as appears by many Cases cited,) evidences the constant Sense of the great Lawyers in *that* Court to be, "That the Statute did *not* " stand in the Way of a *General Remedy upon the Original Right*."

To this Purpose, the Cases mentioned in Chancery *after the Expiration* of the Time given by the Statute of 8 Queen Ann, are *extremely material*: And the Authority of Lord Hardwicke, Lord Talbot, Sir Joseph Jekyll, or any other great Lawyer, sitting in Chancery, and deciding on a *legal Right*, for the Sake of a more effectual Relief given there, is *as good* an Authority, as if they gave an Opinion on that legal Right, sitting in *this* Court.

They have always been so considered; and always so cited.

In the very last Opinion but One, given in the House of Lords by all the Judges, (upon a Limitation over upon dying without Issue, *Kelly v. Fowler*, in *Dom. Proc.* in *January 1768*,) the Cases cited were almost all of them Determinations in the Court of Chancery.

It is most certain, that an Injunction in Nature of an *Injunction to stay Waste*, never is *continued to the Hearing*, where the Court is not strongly of Opinion with the Plaintiff: And if the Case can not be varied at the Hearing, the *same* Grounds upon which it is *continued*, must be sufficient for a *perpetual Injunction*.

And therefore where the Defendant can not vary the Case, he submits, and the Cause stops; unless the Plaintiff thinks fit to go on for some further Relief, besides the Injunction: Or, if
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the Defendant is dissatisfied with the Order continuing the Injunction, he may appeal to the House of Lords. And many Questions are finally determined in that short Way.

Upon the Case of *Eyre v. Walker*, Sir Joseph Jekyll granted an Injunction to restrain the Defendant from printing *The Whole Duty of Man*; though the first Assignment that was produced appeared to have been made in *December 1657*. It was said at the Bar, "that it must be the *New Whole Duty of Man*; and "that it must be *within* the Time of the Act." I have compared the Title-Pages of those Two Books. They are very different: And the Copy of the Order of the 9th of *June 1735* shews it to be the *old One*. Dr. Hammond's Letter to the Book-feller shews it to be that in 1657.

The Answer given to the Case of *Motte v. Falkner*, 28th of *November 1735*, before Lord Talbot, for printing *Pope's* and *Swift's* Miscellanies, was, "that this Book of Miscellanies was "printed in the Year 1727." But it was argued by the Counsel in Chancery, upon the Foundation that many of the *Parts* of that Miscellany were printed so long before as to take it entirely out of the Act; as "Contests and Dissentions at *Athens* and "Rome"; "Predictions for 1708 †;" "Partridge's Death, * 1701. † 1708. ‡ 1707. § 1708. "1708 ‡;" "Sentiments of a Church of *England Man* §." Lord Talbot continued the Injunction as to the *Whole*.

In *Tonson et al. v. Walker alias Stanton*, 5th of *May 1739*, to restrain the Defendants from printing *Milton's Paradise Lost*, The Injunction was granted by Lord Hardwicke, on Lord Mansfield's Motion, upon reading the Assignment in 1667 ‡; and acquiesced under.

|| Assignment by the Author, 27th April 1667, to Samuel Symonds; and several mesne Assignments.

In *Tonson v. Walker and Merchant*, 30th of *April 1752*; the Bill had been filed on 26th of *November 1751*, suggesting the Defendants had advertised to print *Milton's Paradise Lost*, with his Life by *Fenton*, and the Notes of all the former Editions, of which Dr. *Newton's* were the *last*, in 1749. (These *last* Notes were *within* the Act.) Upon a very solemn Hearing, Lord Hardwicke granted the Injunction: And it was penned in the Disjunctive,—“To restrain the Defendants from printing the Life of “*Milton*, or *Milton's Paradise Lost*, or Dr. *Newton's* Notes.”

These Cases prove “that the Court of Chancery granted Injunctions to protect the Right, on Supposition of its being a “legal One.”

And no Injunction was ever refused in Chancery, upon the Common-Law Right, till a Doubt was supposed to have arisen in this

Court, from the Case of *Tonson v. Collins* (which was then depending) having been twice argued, and then adjourned to be argued before all the Judges: The Reason of which has often been declared to be, *not* from any *Doubts* or *Difference of Opinion*; but merely from a Supposition of *Collusion*; and which Collusion was afterwards the Cause why it was neither argued nor determined.

UPON THE WHOLE, I conclude, that upon every Principle of *Reason, natural Justice, Morality* and *Common Law*; upon the Evidence of the *long-received Opinion* of this Property, appearing in ancient Proceedings, and in Law-Cases; upon the clear Sense of the *Legislature*; and the Opinions of the *greatest Lawyers* of their Time, in the Court of *Chancery*, since that Statute; The RIGHT of an Author to the COPY of his Works appears to be well founded; And that the Plaintiff therefore is, upon this special Verdict, *intitled to his Judgment*. And I hope the Learned and Industrious will be permitted from henceforth, not only to reap the *Fame*, but the PROFITS of their ingenious Labours, without Interruption; to the Honour and Advantage of Themselves and their Families.

MR. JUSTICE YATES was of a different Opinion from the Two Judges who had spoken before him.

He said he should ever be extremely diffident of any Judgment of his own, when he had the Misfortune to dissent from Either of his Brethren: And, and after the very learned and ingenious Arguments which each of them had now delivered, he could not but feel, with particular Sensibility, the unequal Task he had now before him.

He regretted too, that in so liberal a Question, so important to the Literary World, and a Question of so much Expectation, there should be any Disagreement upon this Bench. But he observed, that if he should happen to stand quite *alone* in the Opinion he had formed, his Sentiments would no Way affect the *Authority* of the Decision.

Whatever his Opinion, however, might be; fitting in his *judicial* Capacity, he thought himself bound, both in *this* and in *every* Cause, to declare it *frankly and firmly*.

After this very decent Preface, he spoke near Three Hours in Support of his Opinion. It cannot therefore be expected that I should give the very *Words* which he spoke: But I shall endeavour to convey the *Substance* of what he said; though not without some Injury to the Composition and Language.

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It was to the following Effect—

The *General Question* for the Determination of the Court, is,
“ Whether, *after a voluntary and general Publication* of an Au-
“ thor’s Works by *himself*, or by his *Authority*, the *Author* has
“ a *SOLE and PERPETUAL Property* in that Work; so as to give
“ him a Right to *confine* every subsequent Publication to *himself*
“ and his *Assigns* for ever.”

Before I enter into the particular Discussion of this Question, I will lay down One general Position; which, I apprehend, can not be on either Side disputed:—“ That in all *private* Compo-
“ sitions, (I mean the Composition of *private Authors*, as contra-
“ distinguished from *public Prerogative Copies*,) the *Right of*
“ *Publication* must for ever depend on the Claimant’s *Property* in
“ the Thing to be published.” *Whilst* the Subject of Publica-
“ tion *continues his own exclusive Property*, he will *so long* have the
“ *sole and perpetual Right to publish* it: But whenever that *Property*
“ *ceases*, or by any Act or Event becomes *common*, the *Right of*
“ *Publication* will be *equally common*.

In delivering my Sentiments upon this great Question, I will pursue the same Method in which it was argued at the Bar, both in this, and in a former Cause between *Tonson* and *Collins*: For, I desire (once for all) to be understood as delivering my Opinion, *upon the Arguments of the Counsel*, and *upon my own Consideration* of the Matter; and *not by Way of Reply* to any Thing that has fallen from either of my Brothers.

By the Counsel, it was argued on these Two Points—1st, On the *general Principles of Property*; and 2dly, On the peculiar, or at least the *supposed Usage and Law of this Kingdom*.

First then, It was contended, “ That the Claim of Authors to
“ a *perpetual Copy-Right* in their Works, is maintainable upon
“ the *general Principles of Property*.” And this, I apprehend, was a necessary Ground for the Plaintiff to maintain: For, however peculiar the Laws of this and every other Country may be, with Respect to *Territorial Property*, I will take upon me to say, that the Law of *England*, with respect to all *personal Property*, had its grand Foundation in *Natural Law*.

In support therefore of this first Proposition, several plausible Arguments were ingeniously urged by the Plaintiff’s Counsel. In the first Place, they observed, Property was defined to be “ *Jus*
“ *utendi et fruendi*,” and that an Author has certainly *that Right* over his own Productions.

But this is a Definition that merely relates to the *personal Dominion of a Proprietor*, and *not to the Object*: It respects an *acknowledged Subject* of Property; not the Object which is *presumed* to be so; (which is *now the Question in Dispute*.) Nay, it even supposes an *acknowledged Proprietor*; and merely describes the *Extent* of his Dominion. He who has the Property is the *Proprietor*. But the Dominion of a Proprietor can not extend beyond the *Duration* of the Property: No Man can have that Right beyond the just Bounds of his Property. And the Point contended by the Defendant is, “that a literary *Publication* becomes *no longer an Object of Property*,” “that a literary *Publication* becomes *no longer an exclusive private Right*.”

In Answer to this, it was contended on the other Side, “that an Object of Property is *VALUE*; and literary Compositions *have their Value*, which is *measured by the Extent of their Sale*.”

I might here observe, that it will be difficult to annex a specific Value to *incorporeal Sentiments*, when they are *detached from the Manuscripts*, and *published at large*. From *that Time*, the Value, with Respect to the Author, *depends upon his Right to the sole and perpetual Publication* of them: And the great Point in Question is, “Whether he is intitled to that Right, or not.” But laying this Observation aside, *Mere Value*, (all may see,) will *not describe the Property* in this. The *Air*, the *Light*, the *Sun*, are of Value ineffimable: But *Who* can claim a *Property* in them? *Mere Value* does not constitute Property. Property must be somewhat *exclusive* of the Claim of *Another*.

It was therefore alledged, “that a literary Composition is *certainly in the sole Dominion* of the Author, *till he thinks proper to publish it*.” For, no Man can lawfully take it from him, or compel him to publish against his Will.

This is most certainly true. But this holds good no longer than *while it is in Manuscript*.

Here, the Defendant has not meddled with the Author's *Manuscript*. The Work was *published* Forty Years ago. The Defendant has printed a Sett of his Own. He has not meddled with any *Property* of the *Author's*; unless the very *Style and Sentiments* in the Work were *his*.

It was necessary therefore for the Plaintiff's Counsel, to advance this Proposition (and which was the only one that affected the Cause) namely, “That the *Author* has a *perpetual Property* in
 “ the

“ the *Style and Ideas* of his Work ; and therefore that *he or his Assigns* will be *for ever* intitled to the *sole and exclusive Right* of it.”

It was argued, That Invention and Labour are the Means of acquiring Property ; and that literary Compositions are the Objects of the *Author's sole Pains and Labour* : Therefore they have the *sole Right* in them.

If this Argument is confined to the *Manuscript*, it is true : It is the Object *only* of his *own Labour*, and is *capable of a sole Right of Possession*. But it is *not* true, if extended to his *IDEAS*.

All Property has its proper Limit, Extent, and Bounds. *Invention* or *Labour* (be they ever so great) can not change the *Nature* of Things ; or establish a Right, where no private Right can possibly *exist*.

The Inventor of the Air-Pump had certainly a Property in the *Machine* which he formed : But did he thereby gain a Property in the *Air*, which is common to All ? Or did he gain the sole Property in the *abstract Principles* upon which he constructed his Machine ? And yet these may be called the Inventor's Ideas, and as much his sole Property as the Ideas of an Author.

To extend this Argument, beyond the *Manuscript*, to the very *IDEAS* themselves, seems to me very difficult, or rather quite wild. Indeed the Invention and Labour, which are ranked among the Modes of acquiring specific Property in the Subject itself, are *that Kind of Invention and Labour*, which are known by the Name of *Occupancy*. In *that* Sense, *Invention* is defining or discovering of a *vacant Property* : And *Labour* is the taking *Possession* of that Property, and bestowing *Cultivation* upon it. Property is founded upon *Occupancy*.

But how is *Possession* to be taken, or any Act of *Occupancy* to be asserted, on *mere intellectual Ideas* ? All Writers agree, that *no* Act of *Occupancy* can be asserted on a *bare Idea of the Mind*. Some *Act of Appropriation* must be exerted, to take the Thing out of a State of being common, to denote the Accession of a *Proprietor* : For, otherwise, how should *other* Persons be apprized They are not to use it ? These are Acts that must be exercised upon *Something*. The *Occupancy* of a *Thought* would be a new Kind of *Occupancy* indeed. By *what outward Mark* must the Property denote *Appropriation* ? And if these are void of *that* which the Act of *Occupancy* requires, it is a Proof to me they cannot be the *Object* of Property.

Here another Doubt arises, which I can not, I acknowledge, answer—"At what *Time*, and by what *Act*, does the Author's *Common Law Property attach?*"

The *Statute of Queen Ann* very properly obviated this, by fixing the Commencement of his Property from the *Time of Publication*; first, *entering* it at Stationers Hall. And in the Case of a *mechanical Invention*, it commences from the *Date* of the Patent.

But if Authors derive their Right from *Common Law*, (a Law which has existed from Time immemorial, and therefore long before the Stationers Company existed, and can have no Dependence on the Stationers Company,) the Author's Right will be the *same*, whether he *enters* it in that Book, or not.

When therefore does this Idea of the Author's Property *attach*? In other Cases, as where the Heir has a Right to any Species of Property, it commences from his *taking Possession*. An Author is fully possessed of his Ideas, when they *arise* in his Mind: And therefore from the Time these Ideas *occur* to him; or from the Time he *writes them down*, they are his Property. Then if another Man has the *same* Ideas as an Author, he must not presume to publish them: He may be told these Ideas were *pre-occupied*, and thereby became *private Property*.

It would be strange indeed, if the very Act of *Publication* can be deemed the *Commencement of private Property*. Even after Publication, many Thousands may never set their Eyes upon the Book: Yet would not these have a Right to choose the same Subject? and may they not have the *same Ideas* upon it?

The Improbability of their *bitting* upon those Ideas is not to the Point. If they *should* occur to the Author, he has a Right to publish them. Of this, I think, there can hardly be a Doubt. Yet Property, says *Pufendorf*, is a Right by which the very Substance of a Thing belongs to *one* Person, so that it can not, in the Whole, nor after the same Manner, become *Another's*. And the Digests speak to the like Effect. Sentiments are free and open to all: And many People may have the same Ideas upon the same Subject. In that Case, every one of these Persons to whom they independently occur, is equally possessed and equally Master of all these Ideas; and has an equal Right to them as his *own*. Is it possible then that any one Individual can have a *sole and exclusive Property* in these?

But

But there is one Ground more upon which the Plaintiff's Counsel contended this Claim of Right; and which, at first Sight, appears the most specious of all. They endeavoured to enforce this Copy-Right of Authors, as a *moral* and *equitable* Right; and to support it by Arguments calculated to prove that it is so.

For this Purpose, Mr. *Blackstone* observed that the Labours of the *Mind* and Productions of the *Brain* are as justly intitled to the Benefit and Emoluments that may arise from them, as the Labours of the *Body* are; And that literary Compositions, being the Produce of the *Author's own Labour and Abilities*, he has a *moral* and *equitable Right* to the Profits they produce; and is fairly intitled to these Profits *for ever*; and that if Others usurp or encroach upon these moral Rights, they are evidently guilty of Injustice, in pirating the Profits of Another's Labour, and reaping where they have not sown.

This Argument has indeed a captivating Sound; it strikes the Passions with a winning Address: But it will be found as fallacious as the Rest, and equally begs the very Question in Dispute. For, the *Injustice* it suggests, *depends* upon the *Extent* and *Duration* of the *Author's Property*; as it is the *Violation* of that Property that must alone *constitute* the Injury. If therefore his Property be *determined*, no Injury is done him. The Question, therefore, is "whether ALL the *Property* of the Author did not *cease*, and "the Work become *open*, by his own Act of PUBLICATION." In that Case, the Defendant can not be charged with *any Injustice*; but has merely exercised a *legal* Right. And however we may lean to literary Merit, the Property of *Authors* must be subject to the *same Rule of Law*, as the Property of *other Men* is governed by. It is, therefore, *as* capable of being *laid open*, *as any other* Invention of any other Man's: And if, by *Publication*, it becomes *common*, (as I shall observe by and by,) Can the Author *complain* of the Loss? Can he complain of losing the Bird he has himself voluntarily turned out?

But it is insisted, "that it conscientiously belongs to the Author himself, and his Assigns, *for ever*; as being the Fruits of "his own Labour."

"That every Man is intitled to the *Fruits of his own Labour*," I readily admit. But he can only be intitled to this, *according* to the fixed Constitution of Things; and *subject* to the general Rights of Mankind, and the general Rules of Property. He must not expect that these Fruits shall be *eternal*; that he is to monopolize them to Infinity; that every Vegetation and Increase shall

shall be confined to *himself alone*, and *never* revert to the *common Mass*. In *that* Case, the Injustice would lie on the Side of the *Monopolist*, who would thus *exclude all the Rest* of Mankind from enjoying their *natural and social Rights*.

The Labours of an Author have certainly a Right to a *Reward*: But it does not from thence follow, that his Reward is to be *infinite*, and *never to have an End*. Here, it is *ascertained*. The *Legislature* have *fixed the Extent* of his Property: They have allowed him Twenty-eight Years; and have expressly declared, he shall have it *no longer*. Have the Legislature been guilty of Injustice? Little Cause has an Author to complain of Injustice, after he has enjoyed a Monopoly for Twenty-eight Years, and the Manuscript still remains his own Property. It has happened in the present Case, that the Author and his Assignee together, have enjoyed the Emolument of this Work between Thirty and Forty Years: And the Plaintiff still has the Manuscript.

If a Stranger had taken his Manuscript from him, or had surreptitiously obtained a Copy of his Work and printed it before him, he might then complain of Injustice. And here lies the *Fallacy* of this specious Argument: It was put as if the Author was *totally robbed* of the Profit of his Labour; As if *all* his Emolument was forestalled, without suffering him to reap *any* Emolument *whatever*.

In *that* Case, it would be the *biggest Injustice*. But when *no such* Intrusion has been made upon his Property; when he and his Assigns have enjoyed the *whole Produce* of his Labour for *Twenty-eight Years* together and upwards, What Ground can remain for accusing the Defendant of *Immorality*; or for the Author or his Assigns to say "He is *robbed* of the Fruits of his Labour?"

If an Author is permitted to enjoy his Property according to the *Nature* of it, he can have *no Injustice* done him: And if his Situation is such, that he can only dispose of it as other People can of their Goods; or if he can only dispose of it for the *first Publication*; Can the Author *murmur*, because he can dispose of it *only as other People* can of *their* Property? Shall an *Author's* Claim continue, *without Bounds of Limitation*; and *for ever restrain all the Rest* of Mankind from their *natural Rights*, by an *endless Monopoly*? Yet *such* is the Claim that is now made; a Claim to an *exclusive* Right of Publication, *for ever*: For, Nothing less is demanded as a Reward and Fruit of the Author's Labour, than an *absolute Perpetuity*.

EXAMPLES might be mentioned, of *as great* an Exertion of natural Faculties, and of *as meritorious* Labour in the *mechanical* Inventions,

Inventions, as in the Case of *Authors*. We have a recent Instance, in Mr. HARRISON's *Time-piece*; which is said to have cost him Twenty Years Application: And might not he insist upon the *same* Arguments, the *same* Chain of Reasoning, the *same* Foundation of moral Right, for Property in *his* Invention, as an Author can for *his*?

If the Public should rival him in his Invention, as soon as it comes out, might not he *as well* exclaim, as an Author, "that they have *robbed* him of his Production, and have *iniquitously* reaped where they have *not sown*?" And yet we all know, *whenever* a MACHINE is *published*, (be it ever so useful and ingenious,) the *Inventor* has no Right to it, but *only* by PATENT; which can *only* give him a *temporary* Privilege.

As therefore, this Charge of *Injustice* depends upon the EXTENT of the Author's Property; (for if *no Right* is invaded, *no Injury* is done;)—Let us now consider the *general Rules concerning* PROPERTY; and see whether this Claim will *coincide* with *any One* of them.

THE CLAIM is to the STYLE AND IDEAS of the Author's *Composition*. And it is a well-known and established Maxim, (which I apprehend holds as true now, as it did 2000 Years ago,) "That Nothing *can* be an *Object* of Property, which has not a *CORPOREAL Substance*."

There may be many *different Rights*, and particular *distinct Interests*, in the *same Subject*; and the several Persons intitled to these Rights may be said to have an *Interest* in them: But the *Objects* of them all, the *principal Subject* to which they relate, or in which they enjoy, must be *corporeal*. And this, I apprehend, is no arbitrary ill-founded Position; but a Position which arises from the *necessary Nature of all Property*. For, Property has some certain, distinct and separate *Possession*: The *Object* of it, therefore, must be something *visible*. I am speaking now, of the *Object* to which *all Rights are confined*. There must be something *visible*; which has *Bounds* to define it, and some *Marks* to distinguish it. And that is the Reason why these great Marks are laid down by all Writers—It must be something that is *visibly* and *distinctly* enjoyed; that which is *capable* of all the Rights and Accidents and Qualities incident to Property: And this requires a *Substance* to sustain them.

But the *Property here claimed* is all *ideal*; a Set of Ideas which have *no Bounds or Marks* whatever, Nothing that is capable of a *visible Possession*, Nothing that *can sustain any One* of the Qualities or Incidents of Property. Their *whole Existence* is in the

Mind alone ; *incapable* of any *other* Modes of Acquisition or Enjoyment, than by *mental* Possession or Apprehension ; safe and invulnerable, from their own *Immateriality* : No *Trespass* can reach them ; no *Tort* affect them ; no *Fraud* or *Violence* diminish or damage them. Yet these are the *Phantoms* which the Author would grasp and confine to himself : And these are what the Defendant is charged with having robbed the Plaintiff of.

In Answer to these Objections, it was alledged for the Plaintiff, “ that there are *many other Instances* of *incorporeal* Rights ; “ such as all the various Kinds of prescriptive Rights and partial “ Claims.”

But the Fallacy lies in the equivocal Use of the Word “ Property ;” which sometimes denotes the Right of the *Person* ; (as when we say, “ such a One has this Estate, or that Piece of “ Goods ;”) sometimes, the Object itself.

Here, The Question is upon the *Object* itself, not the *Person*. I readily admit that the Rights of Persons may be incorporeal.

But the Question is now, “ Whether any Thing *can be the Object of proprietary Right*, which is *not the Object of Corporeal Substance*.” And, for my own Part, I know not of any one Instance of any one Right which has not Respect to *corporeal* Substance. Every prescriptive Inheritance, every Title whatever has Respect to the *Lands* in which they are exercised. No Right can exist, without a *Substance* to retain it, and to which it is confined : It would, otherwise, be a Right without any Existence.

To get over this, it was said, The Profits of Publication, *till* they are received, are *uncertain and casual*, and can not in themselves be an Object of Property : They are also *incidental*, arising entirely from the Matter which is published. The *Composition* therefore is the *principal Object of Property* ; upon which, all the Profits depend, and which alone can intitle the Author to those Profits : For, these, like the Profits of an Estate, depend upon the Property in that Person to whom they arise.

If the Author will pretend to a *perpetual* Right in those, he must prove he has a perpetual Right to the Ideas which produced them.

Then the Question returns again, “ Whether, *after Publication*, the Work continues *solely* the Author's *for ever*.”

* V. ante,
pa. 2358.

Here, the Maxim occurs which I mentioned before *, That Nothing can be an Object of Property, which is not capable of a *sole*

sole and exclusive Enjoyment. For, Property, as *Pufendorf* observes, implies a Right of *excluding* Others from it. For, *without* that Power, the Right will be *insignificant*: It will be in vain to contend that “*that is your Own,*” which you can not prevent Others from *sharing in*.

It is not necessary, I own, that the Proprietor should always have the total *actual Possession* in himself. A *potential Possession*; a *Power* of confining it to his own Enjoyment, and excluding all Others from partaking with him; is an Object or Accident of Property.

But how can an Author, *after publishing* his Work, *confine it to himself*? If he had kept the Manuscript from Publication, he might have excluded all the World from participating with him, or knowing the Sentiments it contained: But by *publishing* the Work, the Whole was laid *open*; every Sentiment in it made *public, for ever*; and the Author can *never recall* them to himself, *never more confine* them to himself, and keep them subject to his own *Dominion*.

The Quotation from the Institutes relating to Wild Animals, is very applicable to this Case. They are yours, while they continue in your Possession; but no longer. So, from the Time of *Publication*, the *Ideas* become *incapable* of being *any longer* a Subject of Property: *All Mankind* are equally intitled to read them; and every Reader becomes *as fully possessed* of all the Ideas, as the Author himself ever was.

From these Observations, this Corollary, in my Opinion, (for I speak only my own Sentiments,) does naturally follow; “That the *Act of Publication*, when *voluntarily* done by the *Author himself*, is, virtually and necessarily, a *GIFT to the Public*.” For, when an Author throws his Work into so public a State that it must immediately and unavoidably become common, it is the same as expressly giving it to the Public. He knows, before he publishes, that this will be the *necessary Consequence* of the Publication: Therefore he must be deemed to *intend* it. For, Whoever does an Act of any Kind whatever *designedly* and *knowingly*, must of Course *intend every necessary Consequence* of that Act. To this I might add, that in every Language, the Words which express a Publication of a Book, express it as *giving* it to the Public.

But in the Argument, it was contended, “that the Author gives Nothing to the Public, but the *mere Perusal* of it; and still preserves the perpetual Right to the Work;” “That an Author’s publishing and selling a Book is only like giving the
“ Buyers

“ Buyers so many *Keys* to a Gate, or *Tickets* to an Opera ;” that
 “ those were only given for the Parties *themselves*, but would
 “ not intitle them to forge *other* Keys or Tickets.”

To this the Answer is, I think, easy and Evident. If the Author had not published his Work at all, but *only lent* it to a particular Person, he might have enjoined that particular Person, “ that he should *only peruse* it ;” because, in *that* Case, the Author’s Copy is his *Own* ; and the Party to whom it is lent contracts to observe the *Conditions of the Loan* : But when the Author makes a *general Publication* of his Work, he throws it *open to all Mankind*.

THAT is, then, very different from the Case of giving *Keys* or *Tickets* to *particular Persons*. The *very Condition* of giving them is the Exclusion of all *other* Persons. And these *Keys* or *Tickets* give the Party to whom they are given no Property to the *Land* they pass through, or to the *Opera-House* : They are given them for a *particular Time*, and to give them a *transient Admission*, a temporary Privilege only. It is like an Author’s *lending his Manuscript* to particular Friends ; who still retains the Right over it, to *recall* it whenever he pleases.

But when an Author *prints and publishes* his Work, he lays it *entirely open to the Public*, as much as when an Owner of a Piece of Land lays it open into the *Highway*. Neither the Book, nor the Sentiments it contains, can be afterwards recalled by the Author. Every *Purchaser* of a Book is the *Owner* of it : And, *as such*, he has a Right to make *what Use* of it he pleases.

PROPERTY, according to the Definition given of it by the Defendant’s Counsel, is “ *Jus utendi et fruendi*.” And the Author, by empowering the Bookseller to *sell*, impowers him to *convey this general Property* : And the *Purchaser* of the Book makes *no Stipulations* about the *Manner* of using it.

The *Publisher* himself, who claims this Property, sold these Books, *without* making any Contract whatever. What Colour has he, to *retrench* his own Contract, or *impose* such a Prohibition ?

Nothing less than *Legislative Power* can *restrain the Use* of any Thing. If the Buyer of a Book may not make *what Use* of it he pleases, What Line can be drawn that will not tend to supersede *all* his Dominion over it ? He may not *lend* it, if he is not to *print* it ; because it will intrench upon the Author’s Profits. So that an Objection might be made even to his Lending the Book to his *Friends* ; for he may prevent those Friends from *buying* the Book ;

Book ; and so the Profits of such Sale of it will not accrue to the Author. I don't see that he would have a Right to *copy* the Book he has purchased, *if* he may not make a *Print* of it : For, printing is only a Method of *transcribing*.

With Regard to Books, the very *Matter and Contents* of the Books are by the Author's Publication of them, *irrevocably given to the Public* ; they become *common* ; all the *Sentiments* contained therein, rendered *universally common* : And when the *Sentiments* are made *common* by the Author's *own Act*, EVERY USE of *those Sentiments* must be *equally common*.

To talk of *restraining* this Gift, by any *mental Reservation* of the Author, or any *Bargain* he may make with his *Bookseller*, seems to me quite chimerical.

It is by *legal Actions* that *other Men* must judge and direct their Conduct : And if such Actions plainly *import* the Work being made common ; much more, if it be a *necessary Consequence* of the Act, " that the Work is actually thrown open by it ;" No *private* Transaction or secretly-reserved Claim of the Author can ever *control* that necessary Consequence. Individuals have no Power, (whatever they may wish or intend,) to alter the fixed Constitution of Things : A Man can't retain what he parts with. If the Author will *voluntarily* let the Bird fly, his Property is gone ; and it will be in vain for him to say " He *meant* to retain" what is absolutely flown and gone.

There is another Maxim too, concerning Property ; " That " Nothing can be an Object of Property, that is not capable of " *distinguishable proprietary Marks*."

The principal *End* for which the first Institution of Property was established, was to preserve the *Peace* of Mankind ; which could not exist in a *promiscuous Scramble*. Therefore a moral Obligation arose upon all, " That none should *intrude* upon the *Possession* of Another." But this Obligation could only take Place where the Property was distinguishable ; and every Body knew that it was not open to another. Mankind must have a Knowledge of what is their Duty, in order to observe it by abstaining from every Violation of it : The Breach of a Duty must be *wilful*, to make it criminal.

It was necessary, therefore, that every Person should have some *Indicia*, some *distinguishing Marks* upon his Property, to *denote* his being the Proprietary therein : For, hard would be the Law that should adjudge a Man guilty of a *Crime*, when he had no Possi-

bility of knowing that he was doing the least Wrong to any Individual.

Now where are the *Indicia* or *distinguishing* Marks of Ideas? What distinguishing Marks can a Man fix upon a Set of intellectual Ideas, so as to call himself the *Proprietor* of them? They have *no Ear-marks* upon them; *no Tokens* of a particular Proprietor.

If the *Author's Name* be inserted in the Title-Page, that is no Reason: For, many of our best and noblest Authors have published their Works from more generous Views than pecuniary Profit. Some have written for *Fame*, and the *Benefit of Mankind*: Others have had such pecuniary Views, only for a *Time*; and have *afterwards* left their Work open to all Mankind.

On the other Hand, If the Author's Name was *omitted* in the Title-Page, he might *equally insist* on the Claim: For, if the *Property* be *absolutely his*, he has no Occasion to add his Name to the Title-Page. How is it to be known, when such a Sort of Property is abandoned? In all Abandonments, two Circumstances are necessary; an *actual* relinquishing the Possession, and an *Intention* to relinquish it. But in what Manner is the Possession of intellectual Ideas to be relinquished? Or how is the Intention of relinquishing them to be manifested? *Mere mental Ideas* admit of no actual or visible Possession; and consequently are capable of no Signs or Tokens of Abandonment.

• Sect. 2. The *Legislature* had plainly this Objection in View, when they penned the Statute of Queen *Ann*, to give Authors a temporary Property in their Works. For, in the Preamble, it is said *—"Whereas many Persons may, through Ignorance, offend against this Act; unless some Provision be made, whereby the Property in every such Book as is intended by this Act to be secured to the Proprietor or Proprietors thereof, may be ascertained; Be it therefore enacted, That Nothing in this Act contained shall be construed, &c, *unless* the Title to the Copy of the Book be entered in the Register-Book of the Stationers Company." And from that Register-Book any Person may see whether the Author intended to make a Property of his Work; and they may see the Duration of such Property: For the Property is to commence from the Publication of the Work, provided it be so regularly entered as the Act requires.

But if Authors have a Right at *Common-Law*, they need not enter their Books at all with the Stationers Company: They may *wave that*. And in Case they do *not* enter them, by what Marks, *then*, must this Property in Ideas be distinguished? And how will

will the Difficulty *encrease*, if the Property extends not only to Fourteen, or Twenty-eight Years, but *for ever*?

Therefore it appears to me, That this Claim of a perpetual Monopoly is by no Means warranted by the *general Principles of Property*: And from thence I should have thought that it *could not* be a Part of the *Common Law of England*.

But I will now consider the *second* general Ground, upon which this perpetual Copy-Right was argued at the Bar; namely, the *supposed Usage and Law of this Kingdom*.

Under this Head, it was contended, “ That the Right of an Author to the *sole* Publication and *perpetual* Monopoly of his Works, though it were not maintainable on *general* Principles, is yet a Kind of *customary* Property, a Right that has always been *allowed and supported in this Kingdom*.”

If it was so, it is strange that in all our Laws, where every Kind of Property is so much discussed, a Claim so extensive as this, is not absolutely *established*. And yet it was admitted by the Plaintiff’s Counsel, “ That they *could not produce any one Determination* in a Court of *Law*, that had established any such Kind of Property.” They attempted, however, to set up some extraordinary *Substitutes*, to supply this Deficiency. The first was the *Finding* in the Special Verdict, “ that *before the Reign of Queen Ann*, it was *USUAL* to purchase from Authors the perpetual Copy-Rights of their Books, and to *assign* the same from Hand to Hand, for valuable Considerations; and to make them the Subject of *Family-Settlements*.”

A Description thus painted, with the striking Ideas of *Purchase* and *Family-Possessions*, may, at first Sight, dazzle the Eye, and catch our Passions: But, when nearer looked at, and fairly viewed and examined, we shall find it merely an Illusion.

There are but two Lights, in which it can be applied to the present Question: Either, 1st, As *establishing a customary Property*, in *Fact*; or 2dly, As shewing that there was a *general Idea* or Notion of such a Right, *antecedent* the Statute of Queen Ann.

With Respect to the former—It is impossible that it can establish any *customary* Claim. It is no Usage of which the *Law* can take Notice; being merely an Allegation of *particular* Contracts which some *Individuals* have made before the Reign of Queen Ann. Whereas, to constitute a *legal Custom*, it must have these two Qualities: First, A Custom must import some general Right in a *District*, and not a few mere private Acts of *Individuals*;
And,

And, in the next Place, such Custom must appear to have existed *immemorially*. All Customs *operate* (if they have any Operation) as *positive Laws*. The *mere Fact* of Usage will be *no Right* at all, in *itself*: But when a Custom has *prevailed from Time immemorial*, it has the Evidence and Force of an *immemorial Law*.

If the Custom be *general*, It is the Law of the *Realm*: If *Local only*, It is *Lex Loci*, the *Law of the Place*.

Now, *all* Laws are general, *as far* as the Law *extends*; and *all Customs* of *England* are of Course *immemorial*. No *Usage*, therefore, can be *Part* of that Law, or have the Force of a *Custom*, that is *not* immemorial.

Here, no such general or immemorial Usage is suggested: This Finding is merely an Allegation of *particular* Contracts made with particular *Individuals* before the *Reign* of *Queen Ann*.

So far, it is true, appears upon this Finding, “That *prior* to “that *Reign*, Copies have been *purchased* for valuable *Confiderations*, and made the Subject of *Family-Settlements*.”—But, *how long* before? Whether One Hundred Years, Fifty Years, or Ten Years, is not stated. Very certainly, it could *not* be *immemorial*: For, the *Art of Printing* was *not known* in this Kingdom, * till the *Reign* of *Ed. 4*. Therefore these Contracts could not be derived from the *ancient immemorial* Law of the Land: And, consequently, they could not *create* a Species of Property which was *unknown* to that Law:

* See the
Note subjoin-
ed to the End
of this Case.

It is indeed impracticable, to draw any Inference from such a Proposition as this is. For, the Verdict does not find “that “these Rights were ever *enforced against* STRANGERS.” The *Parties* would undoubtedly *acquiesce in the Agreement*: And the *Families* on whom they were settled would *not reject* a Settlement, however chimerical. But, unless it was shewn that these Claims have been enforced against *Strangers*, no *private Contracts* or *Family-Settlements* can *impose* a LAW upon the *Public*.

It is said, “They serve to shew there was a *general Idea* and “*Apprehension* of the Existence of such a Right, before the *Statute* of *Queen Ann*.” Admit the Idea had been *ever so general*; What are we thence to infer? If the Ideas and Sentiments and Apprehensions of Individuals were sufficient Ground whereupon to establish a Species of *Property*; What a vast Extent would this carry it to!

Immense *Ideas* of Property were raised in the South-Sea Stock, in the Year 1720. In that Year, innumerable Rights of this Kind
4 were

were bought and sold; and these Transactions passed between Parties whose Ideas were as sanguine as any Authors could be “ that the Ideas they sold were real Property:” And yet the Subjects that were sold were, in Truth and Fact, *no* real Property.

The Good-Will of a Shop, or of an Ale-House, and the Custom of the Road (as it is called among Carriers,) are constantly bargained for and sold, *as if* they were Property. But what are these? Nothing more than the Good-Will of the Customers, who may withdraw from them, the very next Day, if they please. The Purchaser of this Custom or Good-Will gains no certain Property in it; he has no Power to *confine* it to himself, nor can he use any Power to *prevent other People* from gaining the Custom. It is an Advantage, indeed, so far of Service, as it gives the Purchaser a *Priority* for Custom. And so it is in the Case of the Publication of a Book: It gives a *Priority*, and gets a Set of *first Customers*. But none of these Cases can establish an *absolute, perpetual, exclusive* Property.

Whatever Ideas Individuals may form, or however they may traffick among themselves in imaginary Claims, they can not affect the real Right of the Public, who are no Parties to such Contracts: They can't create Law.

It is a well-known Maxim in our Law, “ that no Man can “ by any Device whatever, *create a new Consequence* out of an “ Estate, or *innovate* upon the Law of the Land.” He can not annex to his Estate any *novel Conditions* that are *inconsistent* with the Nature of the Estate: Much less, can the Acts or Interests of *Individuals* abridge the *Public* of their *natural Right*, or *establish Monopolies*.

The next Arguments urged in Favour of this Claim, were the *two By-Laws* of the Stationers Company; the former, made in *August 1681*; the latter, in *May 1694*: The former, recognizes it. It is material to attend to the Words of this By-Law. It asserts *, that divers of the Members of the Company had great Part of their Estates in Copies; and that by the ancient Usage of that Company, when any Books or Copies were entered in their Register to any of the Members of that Company, such Persons were always reputed the Proprietors of them, and ought to have the sole printing of them. The next is the same †, only with this additional Entry (after these two Recitals, and reciting “ that the Copies were constantly bargained and sold, amongst “ the Members of the Company, as their Property; and devised “ to the Children and Others, for Legacies, and to their Widows, for their Maintenance;” It is *ordained*, that when any Entry shall be duly made of any Book or Copy, by or for any

* V. ante,
P. 2306.
2307.

† V. ante,
P. 2308.

Member of the Company; in such Case, if any other Member shall, without the Licence or Consent of the Member for or to or by whom the Entry is made, print, import, or expose to Sale, &c, They shall for every Copy forfeit Twelve Pence.

The View of inserting these By-Laws in the Special Verdict, was, first, to draw from the Preamble, something in *Favour* of Copy-Rights; and, in the second Place, to shew that these Rights were *protected* by these By-Laws.

With Respect to the first—Whatsoever these By-Laws, have or might have suggested in Favour of this Claim, they would be certainly *no Evidence* at all. They are *confined to the Members* of that Company, and could not be read against the present Defendant, who is *no Member* of their Company, nor subject to their By-Laws. They are *confined* too to such Books as are entered in the Register-Book of that Company by to or for some Member of the Company: And this is founded on the ancient Privilege of *that Company*; and can only affect their *own Members*.

So *peculiar* a Claim is so far from being a Proof of a *Common-Law* Right, that it is an Argument *against* it. For, if such a Right existed by the *Common Law of the Land*, it could not be spoken of as subsisting only by *Usage of the Company*.

But we are on a Question of LAW: And *that* is only to be determined on *legal* Principles, and *not* upon the Allegation of a particular Set of Men. Here is a Question, “Whether this or “that Article of Property belongs to *A.* or *B.*” And upon a *general* Question, “Whether such a Thing is the *Subject of Property*, or does *freely belong to all*,” it is the LAW that must determine; *not* the *By-Laws* of the Company of Stationers.

It would be strange indeed, if this great Point which the Courts of Law have thought *so arduous* to determine, were to be decided at last by the Opinions and Resolutions of the *Stationers Company*.

With respect to the second View of inserting these By-Laws in the Special Verdict; namely, “the shewing that these Rights of “Authors were protected by these By-Laws”—These By-Laws seem as deficient in this View, and as little capable of establishing this Point, as they were in the former View, and in Support of the Right itself.

These By-Laws, in the first Place, have no Relation to the Claims of *Authorship*. The *Copies* they refer to, are *only* those
Copies

Copies which *particular Members of the Stationers Company* had the *Privilege to print*; either by *Patents* to *Themselves*, or by *Licence* of the Stationers Company. In the next Place, they do *not give Protection*, they do *not pretend* to give Protection, to *any but* those of their *own Company*. The Offence of infringing those Rights, and the Penalties inflicted, are confined to their *own Members only*: And the Penalty is given to the *Company* * *Themselves*. The Whole is nothing more than a *Corporate Regulation* of their *own Company*. Many Members of that Company were possessed of Copies; and Others, of particular Allotments from the Company for the sole printing of their own Books: And, to preserve proper Order *amongst Themselves*, the Books, that each Member was allowed to print, were entered in their Register; that every One's Claim might be *known among Themselves*, and they might not intrude upon *Each Other's* Right.

* V ante,
p. 2307,
2308.

But these Entries and By-Laws extended no further than to the *Members of that Company*. No *Author* whatever had from *them*, the least Pretension to *Copy-Right*. And even these Members themselves could have no Redress against *Strangers*; but only amongst *Themselves*. These By-Laws provided no Remedies against *other* Persons: Nor indeed had the Company a Right to *impose* their Restrictions on any but their *own Body*. Where then is that *Copy-Right* of Authors, which they plead for? Or that general *Protection* which these By-Laws have been imagined to afford to them?

But other Things were urged at the Bar, and several other Matters were substituted, to account for the Want of Judicial Determinations in Favour of this Claim; As, the Charters of the Stationers Company; two Proclamations of *H. 8.* and *Queen Mary*; two Decrees in the Star-Chamber; two Ordinances made in the Time of the Usurpation; and the Licensing Act of 13 & 14 of *C. 2.*

These extraordinary Acts of State were quoted as giving Protection to Copy-Rights, and to account for the Want of Judicial Determinations. But None of them, except the Statute, come regularly before Us; so that we can properly take Notice of them.

If these were *material* to the deciding this Question, they should all, I apprehend, except the Licensing Act of *C. 2.* have been *found by the Jury*. For, all the Rest are *particular Instruments*; and if admissible at all, they were Matter of *Evidence*, and *not of Law*: They could not come properly before Us by Way of *Argument*, from the Bar; nor can we regularly *take Notice* of them, upon the Bench.

But I mention this merely for the Sake of *Precedent and Regularity*; meaning, at the same Time, to wave all Objections of this Sort, and to consider the several Instruments themselves.

First, As to the *Charters of the Stationers Company*—The chief Stress was laid on the Clause in the Charter of 16 C. 2. which mentions the *Proprietors of Copies* entering their Books or Copies in the Register-Book of the Stationers Company; and declares that they should thereupon have the *same Right* as had been usual for One Hundred Years past.

But *the Proprietors* of Books and Copies to *whom this refers*, were merely those *Members of the Stationers Company*, who had the *sole printing* of Books by *Patent*. And we see by their By-Laws, they claim *for Themselves and their Members* a peculiar Privilege in Copies. And there is an *ancient Usage of the Company* referred to and confirmed, as the Usage which existed for One Hundred Years past. It is not pretended, that such Right existed *immemorially*. And whatever these Charters may have suggested, *no Charters from the Crown*, and consequently *no Expressions* in such Charters, could affect the general *Rights of the Subject*. And it would be strange indeed to infer *Usage of Law*, from *Grants* made to the *Stationers Company*.

When the Prerogative made such extraordinary Strides as it did at that Time, the Company were impowered to *search* the Houses of all Printers and Booksellers, and to *seize* all Books that were contrary to any Statute then made or that should be made, &c.

Are we therefore to conclude, or could we draw any Deductions (either legal or historical) that such Search, Seizings or Imprisonments could be *legal* in themselves? And as to the *Protection* these Charters gave to *Copy-Rights*—they do not pretend to *extend* to any Claim of *Copy-Right*; but, to *such Persons only* as should *enter* their Books in that Company's Register. But if Authors had any *Common-Law* Right, it would be *equally good*, whether they entered them there or not: For, such Entry can not *extend* nor *abridge* that Right, if they really had it.

The Institution “that *all* Books should be *entered* in that Register,” was merely *political*: The Design of it was, to suppress *seditious, heretical or immoral* Books. The *inserting* in these Registers the *Claims* of Patentees or any Others, was an original Institution of the *Stationers Company*, and *extended no further* than their *own Members*. With Respect to all *Others*, these Privileges extended not to *them*. This concerned merely their own Govern-

Government: And their own By-Laws could not extend further than their *own Community*.

The two Proclamations were issued, One by *H. 8.* (as despotic a Prince as ever sat upon the Throne;) the Other, by his bigoted Daughter *Queen Mary*; and relate to other Purposes. The Former was a general Proclamation against the printing *any* Books whatsoever without a *Licence*: And that of *Queen Mary*, from printing what she called *heretical* Books.

What have these to do with the *Copy-Right of Authors*? These Exclusions extend as much to *One*, as to *Another*: If the Book was offensive, it was indifferent to the Court, *whose* it was.

The *Patents cum Privilegio* granted the Book to particular Persons, for a certain *Term of Years*.—From hence it was said, “it was *no Innovation* in Authors to claim this *exclusive Right*.” The Patents that were asserted in this Part of the Arguments, were taken from *Ames’s* Typographycal Antiquities; and were so arbitrary gross and absurd, that One would not have expected such a Quotation. *Growte* had a Patent for the * *Primer of Salysbury Use*; † *Saxton*, for all Maps and Charts of *England*; and ‡ *Tallis* and *Birde*, and also § *Morley*, for the printing of Musick; and || *Symcocke*, for all Things printed on one Side of a Sheet, or any Part of a Sheet; provided the other Side was white Paper. In all these Patents there were *Penalties* inflicted; and they had Power given them to *seize* Books, and *search* Houses. They are too gross, to be argued from: But they exclude all Notion of Proprietary Right. The Grant was given to the *Printers* Themselves, without any Regard to the *Authors*, or *new Compositions*. The very *Name* of being Patents to *Printers*, and the *Limits* fixed, shew that they exclude all Ideas of a *literary Right*, and a Property subsisting in the *Author*.

* Qu. Vide Ames, p. 496.
† V. Ames, p. 541 to 544. temp. Queen Eliz.
‡ P. 536.
§ 539. temp. Queen Eliz.
|| P. 569.
P. 570.

Next, we are told of some Proceedings in the *STAR-CHAMBER*; a Court the very Name whereof is sufficient to blast all Precedents brought from it. But I will do the Gentlemen the Justice to say, they did not mean to adduce them as *Authorities*; but to apply them as *historical Anecdotes* in their Favour.

It was said, in One of these Decrees *, That no Person should print any Book, Work, or Copy against the true Intent and Meaning of any Letters Patent, or Prohibition of any known Law of *England*, or other Ordinances laid down for the good Government of the Stationers Company, &c. And this Decree was afterwards by the Command of *Jac. 1.* ordered to be put in Execution.

* 23 June, 1585. Vide ante, p. 2312.

† Or 1637.
Qu. V. ante,
P 2313.

In 1607 †, It was Ordered by a Decree, That no Person should print any Book, which the Stationers Company should, in their Books, prohibit; and which that Company should, by Letters Patent, have a Right of Printing.

Such were the Edicts of that imperious Court. And is it possible to apply this *despotic* Decree to the *legal Right of Authors*, in any Light? *Tyrannical and illegal* as the Star-Chamber was, the *sole Jurisdiction* they possessed was in *Criminal* Matters respecting Books; and these only, (as their Decree mentions,) in such as were *bad*.

† See 3 Inst.
182, 183.

* Cap. 3.
† The 5th
Proviso: V.
3-Inst. 185.

They considered all Infringements of Patents and Grants of the Crown, as *Contempts of Royal Authority*; and on *that* Idea they supported any Patent the Crown thought proper to grant. For, as Lord Coke † observes, “such Boldness the Monopolists took, that often at the Council-Table, Star-Chamber and Exchequer, Petitions, Informations and Bills were preferred, pretending a Contempt for not obeying the Commandments and Clauses of the said Grants of Monopolies, and of the Proclamations concerning the same.” For preventing which Mischief, Lord Coke says, that Branch of the Statute was added, which directs, “That all Grants of Monopolies shall be tried and determined by and according to the *Common-Law*.” In that of 21 *James* the First *, a Proviso was contained, “that it should not extend to any Patent of Privilege concerning † Printing.” Therefore, as to *these* Patents, the Star-Chamber continued the same usurped Power of injoining Obedience, and punishing Contempts.

But the Decrees of this arbitrary Court can not be applied, either judicially or historically, to *civil Cases*, or (more particularly) to the *present Case*.

Of such Kind of Patents the Stationers Company were the *Ingrossers*. Some assumed Claims and Authorities were allowed to them, for the printing of particular Books. They were of Service to the State in suppressing any seditious Books: And so that Authority in them (however unwarrantable in itself) was preserved to them; and the Star-Chamber secured it to them.

By the Charter of *Queen Mary*, the Company of Stationers were made a Kind of literary Constables, to seize all Books that were printed contrary to the Statute, &c. And, as Mr. *Yorke* observed in arguing the Case of *The University of Cambridge v. Baskett*, when once the Company were made absolute, they attempted to execute such Outrages that no body could submit to.
And

And the Star-Chamber supported them, and insisted upon Obedience to the Stationers Company. No Book was allowed to be printed, till it was *entered* in their Register: And consequently, they might stop whatever Publication they pleased. The Star-Chamber was equally zealous in supporting the *Interests*, as the *Powers* of that favourite Company of Stationers: And therefore they exerted the Terrors of their Authority to enforce the *Privilege* which had been granted to them or to any of their Members, by Patents or Charters from the Crown. And this they did, under their *Criminal Jurisdiction*, by assuming a Power, in virtue of it, to punish for *Disobedience* to the *Patents and Royal Grants*, which they were possessed of.

They did not *otherwise* interfere; where there was no Grant or Prohibition, to give them a Colour for it. That Court, with all their Extravagance, extended their Jurisdiction in this Matter, only to the Grants of the Crown, or to the Ordinances of the Stationers Company. Can this, then, be any Proof at all of the *inherent Right of Authors* in the Copies of their Works? A Right, which if it exists at all, is an *original independent* Right. Do these Decrees serve for the Protection of such Rights of *Authors*? Are they so conclusive, as to account for and supply the Want of any *other* Determination in their Favour; when the *whole Right* which was the Subject-Matter of them, is *confined* to the *Stationers Company*, or to those that had *Patents from the Crown*?

The next favourite Topic of the Plaintiff's Counsel was the Ordinances made by the Houses of Parliament. But they were calculated to political Views; except what related to the Stationers Company: And no Protection is given by them to the Copy-Rights of *Authors in general*. What related to the Stationers Company is adapted to the particular Privileges of that Company and its Members. The Ordinance in 1649, is, "That no Person should print or reprint any Book or Part of a Book that was granted to the Stationers Company, without their Consent; nor any Book or Part of a Book which was entered in their Books to or for any Member of the Company, without the Consent of the Owner, &c." The Design was to stop the Publication of those Papers which the Royalists published.

The Title of the other Ordinance * was for stopping unlicensed, scandalous Publications &c: And therefore it enacted, "That no Book should be published, unless it was *approved by the Licensor*." And by the same Ordinance, the Stationers Company were authorized to search for all unallowed Printing Presses employed in printing unlicensed Books &c; and likewise to apprehend all Authors &c.

* In 1652.
Q. V. ante,
p. 2314.

The whole of these Ordinances, from the Beginning to the End, were adapted to the same political Views; except that particular Clause which is entirely confined (like the Star-Chamber Decrees) to the Privileges which had been granted to the Stationers Company, and the particular Claims of their Members.

But there is not a Clause that states or protects the Copy-Right of *Authors*.

The Statute of 13 & 14 C. 2. c. 33. (the Licensing-Act,) was next mentioned at the Bar: And the Plaintiff's Counsel argued that it contained a Recognition of the Copy-Right, and such a *Protection to Authors*, that they need not to seek any other. In Proof whereof, three Clauses of that Act were quoted. In the 18th Section, is a Proviso to save the Rights and Privileges of the Universities touching the licensing or printing of Books. By the third Section, no private Person may print any Book, unless it be entered in the Stationers Company's Register-Book, and licensed, &c. The twenty-third Section contains a Proviso to save the Rights and Privileges of particular Persons who have Grants from the Crown, according to their respective Grants.

But how will these Clauses avail *those Authors* who are not *Members* of the Stationers Company, nor have any *particular Grant* of an exclusive Privilege? Or if the Author had failed to *enter* his Book in the Register-Book of the Company of Stationers, What Relief or Redress could he have had?

For my own Part, I cannot collect from any of these several Instruments, any Authorities that favour the present Plaintiff. They were no Security to the Copy-Rights of Authors in general: Nor can they account for the Want of legal Determinations in favour of the Plaintiff's Claim. The *Patents* were enormous Stretches of the Prerogative, to raise a *Revenue*, and to gratify particular *Favourites*, without the least Regard to *Authors* and *new Compositions*. And all the Rest of these Authorities were founded on *political Views*, to prevent (as they declare) *heretical* and *seditious Publications* &c. And the Orders "that all Books should be entered in the Register of the Stationers Company," were to prevent *improper Publications*; and have no View to establishing the Right of Copy to *Authors*. The *Innocence* or *Delinquency* of the Work, and *not* any private *Property in the Authors*, were the *Object* of their Inquiry. If the Licenser did not approve the Copy, he could *stop the Author himself* from publishing his *own Composition*. The Institution of the Licenser's Office was, to guard against improper Political Publications.

The *By-Laws of the Stationers Company* protect *None* but their *own Members*.

What Security then were all these Instruments for the *Copy-Right of any Author*?

I might also observe upon all these Instruments, that these express Prohibitions plainly *imply* "that Authors had *no* Protection at Common Law:" For, if they had, it would have been, alone and of itself, a *competent* Protection to them; and all these Prohibitions would have been *needless*.

I am now come to the last Resort of the Plaintiff's Counsel for supporting their Claim: And that is, the *Injunctions* that have been granted by the Court of *Chancery*.

Great Attention and Respect is undoubtedly due to the Decisions of a Lord Chancellor: But they are not conclusive upon a Court of *Common Law*. Had these Injunctions (which were only temporary) been *perpetual*, they could have no Effect on a Court of *Common Law*, in a *Common Law Question*.

The Common Law of *England* must direct the Determination of a Common Law Question. By Common-Law Determinations we are bound; and to *them* we must always adhere: For, these are the proper constitutional Declarations of the Law of the Land. They are so considered, even by the Court of Chancery itself. When any Doubt arises in a Cause in *Equity* concerning a Point of *Common Law*, it is usually referred to the Determination of a Court of Common Law. The very Case now before Us is sent hither for our Determination, *because* it is a Question of *Common Law*. But the Courts of Law never apply to a Court of Equity for *their* Decision, in a *Common Law Question*. When the Court of Equity appeals to Us, as a Court of Law, by Reason of its being a Common Law Question, it would seem a little strange, if we should go back to that very Court, to inquire *their* Opinion upon it; or, in other Words, if we should answer the Question they put to Us, by making the very same Inquiry of *them*. Yet that would in Effect be the Case, if we were to form our Decision of this Question, upon the Arguments and Decisions made in the Authorities that have been cited: It would be grounding our Decision upon what is no Judgment or Authority at all. These Injunctions were but temporary Suspensions, "till the Rights should be determined;" and none of them contain any *express* Decision whatever.

It was said at the Bar, "that these Injunctions were acquiesced in, by the Defendants." But no Acquiescence of the Parties can alter the Law. The Court of Chancery could have reasoned and concluded from these Arguments, as well as we: And they would hardly wish Us to draw Deductions from their own Decisions. Their sending the Cause to Us is a decisive Proof "that the Court of Chancery, who granted these Injunctions, consider this Matter as *unsettled*." And in the Case of *Millar v. Donaldson*, which was a Case depending upon Common Law, Lord *Northington* would not determine the Point; but left it to be considered as a *Question of COMMON LAW*.

It is plain, then, that after all these Injunctions, the grand Question itself is still, even in *that* Court, considered as an *undecided* Point.

But as the Plaintiff's Counsel relied so much upon them, I think it a due Respect to the Gentlemen, to examine particularly the Injunctions themselves; and see whether they have any Sort of Influence upon the Question before Us, or not.

It is unnecessary to comment particularly on *every* Injunction that has been mentioned. They may be reduced to these three Classes: 1st, Causes on private Trespas; *surreptitiously* or *treacherously* publishing what the Owner had *never made public* at all, nor *consented* to the Publication of; 2dly, Cases *expressly grounded upon the Statute of Queen Ann*, and *within the Terms* which that Statute has granted; and 3dly, Cases on *Patents* from the Crown for the sole printing what is called *Prerogative Copies*.

Of the first Class, were the Cases of *Webb v. Rose*, *Pope v. Curl*, *Forrester v. Waller*, *The Duke of Queensbury v. Shebbeare*—They have been all stated. I will not restate them; but only observe that in all these Cases the Publications were *surreptitious*, against the *Will* of the Owner, *before* he had consented to the Publication of them: And, *as such*, they will have no Effect upon the *present* Question.

Most certainly, the *sole Proprietor* of any Copy may determine *whether* he will *print* it, or *not*. If any Person takes it to the Press without his Consent, he is certainly a *Trespasser*; though he came by it by *legal Means*, as by Loan or by Devolution: For, he transgresses the *Bounds* of his Trust; and therefore is a *Trespasser*.

Ideas are free. But *while the Author confines* them to his Study, they are like Birds in a Cage, which *none but he* can have a Right to

to let fly: For, *till* he thinks proper to emancipate them, they are under his *own Dominion*.

It is certain every Man has a *Right to keep* his own Sentiments, if he pleases: He has certainly a Right to judge whether he will make them *public*, or commit them only to the Sight of his *Friends*. In *that* State, the Manuscript is, in every Sense, *his peculiar Property*; and no Man can take it from him, or make any Use of it which he has not authorized, without being guilty of a *Violation* of his Property. And as every Author or Proprietor of a Manuscript has a Right to determine whether he will publish it or not, he has a Right to the *first* Publication: And whoever deprives him of *that Priority* is guilty of a manifest *Wrong*; and the Court have a Right to *stop* it. But this does not apply to the *present Question*: *This Author had published it many Years, and received the Profit of it.*

The second Class of Injunctions, in the Manner I ranged them, relates to Injunctions on the Statute of Queen *Ann*. The Case of *Knapton v. Curl*, *Eyre v. Walker*, *Motte v. Faulkner*, *Gill v. Wilcox*, *Tonson v. Walker*, were all the Injunctions, I think, that have been cited, which fall in this Division.

As to the Cases of *Nelson's Fast and Festivals*, and the Whole Duty of Man, I shall let them remain with the Observations that have been made upon them by my learned Brothers; with this additional one, that let the Injunctions be what they may, they were *only till the Hearing*, without any *final decisive* Judgment.

There had appeared some Doubts, (for I have seen Copies of all those Injunctions that were stated in the Plaintiff's Bill,) as to the Whole Duty of Man; because the Copy-Right was entered in the Stationers Register by the Plaintiff himself. In 1735* • V. ante, he filed his Bill, and founded it upon the Statute of Queen P. 2325. *Ann*: (Whether mistaken, or not, is not at all the Question.) And in the Case of *Nelson's Fast and Festivals*, there is the like Allegation, "That it was entered in the Stationers Company's Register." But, as I do not apprehend that either of them will very materially affect the present Question, for the Reason I set out with in the general Observations I have made; I shall not say any more of them; but leave them with the Observations my Brethren have made upon them.

But with Respect to *Milton's Paradise Lost*, I must mention what I have seen in a Note of Lord *Hardwicke's*. It seems from *that*, that the Injunction was founded on Dr. *Newton's Notes*, only. For, his Lordship said "that at first he was inclined to

“ send the Cause to the Judges, to settle the Point of Law : But,
 “ as Dr. Newton’s Notes were *manifestly within 8 Ann*, he would
 “ grant an Injunction to *them*, without deciding the *general*
 “ Question of Property at *Common Law*.”

But from these Injunctions the Plaintiff’s Counsel deduced this Argument, in their Application of them to the present Case,
 “ That all these Injunctions granted since the Statute were found-
 “ ed on a *supposed Property* in the respective Plaintiffs, and a
 “ *legal Right* in the several Copies to which they related ; and
 “ that such a Property must necessarily be a Property at *Common*
 “ *Law* ; as the Statute consists only of *penal* Provisions, and *pre-*
 “ *scribes the Mode* of Prosecution, which Mode the Plaintiffs in
 “ those Cases had not followed.”

To which it might be answered, “ that these Injunctions, be-
 “ ing *temporary only*, decided *Nothing at all*.”

But I will admit, that they were founded on a Right that would support a more *general* Injunction : For, by this Act of Parliament they had certainly a Property in those respective Copies, *during the Term* the Statute has allowed. For, the Statute in the *first* Place, and * *before* any of the penal Provisions, has *affirmatively and distinctly* enacted “ that in any Books *printed*
 “ *before* the making that Statute, the Author, or the Bookseller
 “ who had purchased the Copy in order to print or to reprint it,
 “ should have the sole Right of printing the same for *Twenty-*
 “ *one Years* ; and that in Works not then published, but *after-*
 “ *wards* to be published, they should have the Right for Four-
 “ *teen Years*.”

* V. 8 Ann,
 c. 19. sect. 1.

By this Clause, therefore, a sole Right is *positively vested in the Author*, during the *particular Terms* which the Statute has limited.

The subsequent Provisions, indeed, have annexed *Penalties*, and Forfeiture of the Sheets ; (which are to be damasked.) But the *Right* is wholly confined to the *Parties interested*, the Authors and Purchasers of Copies. The Penalties are given half to the Crown, and half to any common Informer that will sue for them.

To *the Author*, therefore, it is the same as a *Lease*, a *Grant*, or any other *Common-Law Right*, whilst the *Term exists* ; and will equally intitle him to all *Common-Law Remedies* for the Enjoyment of that Right. He may, I should think, file an Injunction-Bill to stop the printing : But I may say, with more Positiveness,
 1 he

he might bring an *Action*, to recover Satisfaction for the Injury done him, contrary to Law, under the Statute.

In the Case of *Ewer v. Jones*, 2 *Salk.* 415. and 6 *Mod.* 26. Lord Chief Justice *Holt* lays it down, “ that wherever a Statute gives a Right, the Party shall, by Consequence have an Action at Law, to recover it.”

The *Author's Remedy* is very different from an *Informer's* prosecuting for the *Penalty*. The Latter must pursue all the Remedies the Statute requires: For, in such a Prosecution, the Charge is for an *Offence*, and therefore the Offence must be *strictly brought within* all the Provisions of the Act. But if the Plaintiff only seeks Satisfaction to himself as the *Party aggrieved*, without prosecuting for any *Penalty*, there is not, in such Case, any Limitation by the Statute.

I here give my Opinion as a *Common Lawyer*; not presuming to say what the Court of *Chancery* would do upon the same Question.

The third Class of Injunctions is of those that have been upon Grants and Patents from the Crown, for the sole printing of what are called *Prerogative-Copies*. Of this Sort, are *The Stationers Company v. Wright*, and *The Stationers Company v. Partridge*. In these Cases, Injunctions were granted: But these, I apprehend, have no Analogy to the private Right of Authors. The Grantees did, indeed, claim a Right of printing these Copies; but *not* as the *Authors*, *Compilers* or *Purchasers*; but merely as the *Printers* of these Books, under a *Patent from the Crown*.

The present Claim is totally different from that of a Grant from the Crown. Here it is argued, “ that Authors have a *perpetual* Right to their *own Copies*.” In that Case of *Partridge*, he was enjoined from printing an Almanac of his own compiling.

The Grand Argument that was drawn from these Injunctions is this—“ That there are certain Books, such as the Bible, Common-Prayer Book, Acts of Parliament, and the like, which are usually called *Prerogative Copies*, which the *Crown has the sole Right* of publishing: And *if* the *King* may have a *legal Property in these*, there is no Reason why private Authors may not claim a *sole Right* in their *own Compositions*.”

“ That there *is* such a Right in the Crown,” is undoubtedly true. But this is *confined* to Compositions of a *particular Nature*; and to me seems to stand upon Principles entirely *different* from the Claim of an Author. It is *not* from any Pretence of *Dominion*

over *Printing*, that this *Prerogative Right* is derived: For, the Crown has certainly *no* Right of Control over the Press. But it is to *particular* Copies that this Right does extend: And as *no other* Person is permitted to publish them, without *Authority* from the Crown, the King is said to have a *Property* in them.

THIS Kind of Property has always the additional Distinction of *Prerogative* Property. The Right is grounded upon *another Foundation*; and is founded on a Distinction that can not exist in common Property, and in the Case of a Subject.

The Books are Bibles, Common-Prayer Books, and all Extracts from them, (such as Primers, Psalters, Psalms,) and Almanacs. Those have Relation to the National Religion, or Government, or the political Constitution. Other Compositions to which the King's Right of Publication extends, are the Statutes, Acts of Parliament, and State-Papers. The King's Right to all these is, as Head of the Church, and of the political Constitution.

In the Case of *The Company of Stationers v. Lee and others*, which is reported in 2 *Show* 258, it is urged that, as the King is the Head of the Church, he has a particular *Prerogative* in printing of Primers, Psalters, Psalms, &c; and in restraining and licensing Prognostications of all Sorts.

In the Case of *The Stationers Company v. Wright*, (which was for importing, and printing Psalms, Psalters and Almanacs,) the Words of the Injunction are these — “ This Court, in Respect to
“ the well and true printing of Psalms, Psalters and Almanacs,
“ as it is of great Concern to the Public, and of great Danger to
“ have these Books printed in a foreign Nation, by any besides
“ the Patentees and their Assigns, &c.”—And therefore an Injunction was granted.

In the Case of *The Stationers Company v. Partridge*, the Company grounded their Plea on a Right from the Crown, being licensed by the Archbishop of *Canterbury*, for printing Almanacs.

In the Case of *The Stationers Company v. Seymour*, The Court assigned these Reasons— * “ That there was no Difference in
“ any material Part, between that Almanac of *Gadbury's*, and that
“ that is put in the Rubrick of the Common-Prayer Books.”
They said, “ the latter was first settled by the *Nicene* Council;
“ is established by the Canons of the Church; and is under the
“ Government of the Archbishop of *Canterbury*: So that Almanacs may be accounted *Prerogative* Copies.”

And

And in a subsequent Part of their Opinion, the Court observed *, “ that since Printing has been invented, and is become * V. 1 Mod. “ a common Trade, Matters of State and Things that concern ^{258.} “ the Government were never left to any Man’s Liberty to print, “ that would.”

The Case of the Company of Stationers, 2d Chancery Cases 76, and again in Page 93 of the same Book, was this—The Company had a Patent for printing the Statutes. The Defendant had some Books of the Statutes printed at *Amsterdam*, and imported them. The Lord Chancellor determined that Printing the Laws was a Matter of State, and concerned the State. But as for the Whole Duty of Man and such like Books, the Lord Chancellor left them to the ordinary Course. It is asserted in Page 93, “ that the Defendant was not suffered to print these “ Books, because it was of great and public Consequence for “ Strangers to print and vend in *England*, our Statutes and Laws, “ if falsely done.”

In the Case of *Millar v. Donaldson*, which was before Lord † V. ante, *Northington* in 1765 †, his Lordship observed, “ that in the P. ^{2327.} “ Cases which had been determined in Favour of the Stationers “ Company, the Court went upon the Letters Patent.”

Upon the whole of this Prerogative Claim of the Crown, it appears to me, that the Right of the Crown to the sole and exclusive printing of what is called *Prerogative Copies*, is founded on Reasons of Religion or of State. The only Consequences to which they tend are of a national and public Concern, respecting the established Religion, or Government of the Kingdom; and have no Analogy to the Case of *private Authors*. There is no Instance of the Crown’s intermeddling with, or pretending any such Right in private Compositions.

It is necessary in all these Claims, that Uniformity and Order be duly observed; and the Subject informed with Precision, how to regulate his Conduct.

The King has Ecclesiastical Jurisdiction: And Power is given to him over these Publications, that no Confusion may be introduced by such as are false and improper.

And as *Printing* has, since the Invention of that Art, been the general *Mode of Conveying* these Publications, the King has always appointed his Printer. This is a Right which is inseparably annexed to the King’s Office: But no such Right is annexed to the Situation of any *private Author*. The King does not derive

this Right from Labour, or Composition, or any one Circumstance attending the Case of *Authors*.

It is mentioned as One Ground of the King's Right to print them, "that some of these Prerogative Books were composed at *his Expence*." But in Fact, it is no private Disbursement of the *King*, but done at the *Public Charge*, and Part of the Expences of *Government*. It can hardly be contended, that the Produce of Expences of a *public* Sort are the *private Property* of the *King*, when purchased with public Money. He can not *sell* nor *dispose* of One of those Compositions. How, then, can they be his *private Property*, like the private Property claimed by an Author in his own Compositions?

The Place or Employment of *King's Printer* is properly an *Office*: It was formerly granted by *that Name*, with a Fee annexed to it; and the Person appointed to it, *sworn into the Office*.

From these Authorities, therefore, I say, it seems to me, that the *King's Property* in these particular Compositions called *Prerogative Copies* stands upon *different Principles* than that of an *Author*; and therefore will *not apply* to the Case of an Author.

Now as the Plaintiff contends "that this supposed Copy-Right is what he is by *Common Law* intitled to," let Us examine what *Species* of Property it is. What *Class* of Property does it fall within?

It can not be contended, "that it is *real* or descendible Estate." If it falls within any *Class* of Property at all, it must be that *Species* of Property which the Law calls *Chattels*.

But all Chattel-Property consists of Goods, and Debts or Contracts. Now this Right can not be contended for, as a *Debt*. The Defendant, or the Public, are *not Debtors* to the Plaintiff. Nor can it be claimed as a *Contract*: The Defendant never entered into any *Stipulation* about it.

As, then, it can not be claimed as any *Species* of *Inheritance*, nor yet as a *Debt*, or *Matter of Contract*; there is *but one Class* more of Property, under which it can be reckoned: And *that* is *Goods*.

But *Goods* must be capable of *Possession*; and must, of Course, have some *visible Substance*: For, Nothing but what has visible Substance, is *capable* of actual *Possession*.

The Author's *unpublished Manuscript* will indeed very properly fall under *this* Class of Property; because, *that* is *corporeal*. But *after Publication* of it, the *mere intellectual Ideas* are totally *incorporeal*; and therefore *incapable* of any *distinct separate Possession*: They can neither be seized, or forfeited, or possessed. If they could be Matter of *Property*, they must be *subject* to the *same* several Changes of Possession, as Property is subject to; The *same* Charges, Seizures and Forfeitures; the *same* Circumstances to which *all other* Chattels are *liable*.

Can the Sentiments themselves (apart from the Paper on which they are contained) be taken in *Execution* for a Debt? Or if the Author commits Treason, or Felony, or is outlawed, Can the Ideas be forfeited? Can *Sentiments* be *seized*; or by any Kind of Act whatsoever, be *vested in the Crown*? If they can not be *seized*, the *sole Right of publishing* them can not be *confined* to the Author: For, the Ideas of *Forfeitures* must *ever attend* the Ideas of *Property*.

How strange and singular must this extraordinary Kind of Property be; which can not be visibly possessed, forfeited, or seized; nor is susceptible of any external Injury, nor (consequently) of any specific, or possible Remedy!

But it was said, "that this is a Kind of *special Right* to a *particular Interest*, to a *particular Privilege*."

Now, by the Laws of *England*, there can be no special Right, no particular Interest or Privilege whatever, of *perpetual Duration*, but such as have Respect to some Kind of *Inheritance*. Nothing but an *Inheritance* can support a perpetual subsisting Right. All *personal Property* is total and absolute; susceptible of no collateral Right, or partial Interest; excepting for a Time, as in the Case of a Loan, or the like.

And here, *another Reason* occurs, why the Right now claimed can have no Existence in the *Common Law* of *England*: And that is, that the whole of this Right, in its utmost Extent, is a *mere Right of Action*; a Right of bringing an *Action* against those that print the Author's Work without his Consent. And this Action is merely vindictive: It is *in Personam*; not *in Rem*.

Now there is no Maxim in our Law more clear and plain than this, "that *Things in Actions* are not *assignable*."

The Law is too tenacious of private Peace, to suffer Litigations to be *negotiable*. And yet the *present Action* is founded on the

Assignment of such a Right to sue. This is the Right which the Author has assigned to the Purchaser of the Copy, the present Plaintiff; and upon which Assignment, he brings this Action *in Personam*.

The *Legislature* indeed may *make a new Right*. The Statute of Queen *Ann* has vested a *new Right* in Authors, for a *limited Time*: And *whilst* that Right exists, they will be established in the Possession of their Property.

But we are now considering a Question at *Common Law*: And at *Common Law*, even *Debts* are not assignable so as to enable the Assignee to bring an Action in his *own Name*. However, the present Action is a Tort only: And no Tort is assignable, in Law or Equity. It is not within *any Species* of Action at *Common Law*.

It seems to me, that this Claim will not fall within any one known Kind of Property at *Common Law*; and can not, therefore, be a Common-Law Right.

The Whole Claim that an *Author* can *really* make, is on the *public Benevolence*, by Way of Encouragement; but *not* as an absolute *coercive Right*. His Case is exactly similar to that of an *Inventor of a new mechanical Machine*: It is the Right of every Purchaser of the Instrument, to make what Use of it he pleases. It is, indeed, in the Power of the Crown to grant him a Provision for a limited Time: But if the Inventor has no Patent for it, every One may make it, and sell it.

Let Us consider, a little, the Case of *mechanical Inventions*.

Both original Inventions stand upon the *same Footing*, in Point of *Property*; whether the Case be *mechanical*, or *literary*; whether it be an *Epic Poem*, or an *Orrery*. The Inventor of the One, as well as the Author of the Other, has a Right to determine “whether the World shall see it or not:” And if the Inventor of the Machine chooses to make a Property of it, by selling the Invention to an Instrument-Maker, the Invention will procure him Benefit. But when the Invention is once made known to the World, it is laid open; it is become a Gift to the Public: Every Purchaser has a Right to make what Use of it he pleases. If the Inventor has no Patent, any Person whatever may *copy* the Invention, and *sell* it. Yet every Reason that can be urged for the Invention of an Author may be urged with equal Strength and Force, for the Inventor of a Machine. The very same Arguments “of having a Right to his own Productions,” and all others, will hold *equally*, in both Cases: And the *Immorality* of
pirating

pirating another Man's *Invention* is full as great, as that of purloining his *Ideas*. And the Purchaser of a Book and of a Mechanical Invention has exactly the same Mode of Acquisition: And therefore the *Jus fruendi* ought to be exactly the same.

Mr. *Harrison* (whom I mentioned before) employed at least as much *Time* and *Labour* and *Study* upon his Time-keeper as Mr. *Thomson* could do in writing his *Seasons*: For, in planning that Machine, all the Faculties of the Mind must be fully exerted. And as far as *Value* is a Mark of Property, Mr. *Harrison's* Time-Piece is, surely, as *valuable in itself*, as Mr. *Thomson's* *Seasons*.

So the other Arguments will equally apply. The Inventors of the Mechanism may as plausibly insist, "that in publishing their Invention, they gave Nothing more to the Public than merely the *Use* of their Machines;" "that the Inventor has a *sole Right of selling* the Machines he invented;" and "that the Purchaser has *no Right to multiply or sell* any Copies." He may argue, "that though he is not able to bring back the *Principles* to his own sole Possession, yet the Property of *selling* the Machines justly belongs to the Original Inventor."

Yet with all these Arguments, it is well known, *no such Property can exist*, after the Invention is *published*.

From hence it is plain, that the *mere Labour and Study* of the Inventor, how intense and ingenious soever it may be, will establish *no Property* in the Invention, will establish no Right to *exclude Others* from making the same Instrument, when once the Inventor shall have published it.

On what Ground then can an *Author* claim this Right? How comes *his* Right to be superior to that of the ingenious Inventor of a new and useful Mechanical Instrument? Especially, when we consider this Island as the Seat of Commerce, and not much addicted to Literature in ancient Days; and therefore can hardly suppose that our Laws give a higher Right or more permanent Property to the Author of a Book, than to the Inventor of a new and useful Machine.

Improvement in Learning was no Part of the Thoughts or Attention of our Ancestors. The Invention of an Author is a Species of Property *unknown* to the Common Law of *England*. Its Usages are *immemorial*: And the Views of it tend to the Benefit and Advantage of the Public with respect to the Necessaries of Life, and not to the Improvement and Graces of the Mind.

The

The latter therefore, could be no Part of the ancient Common Law of *England*.

* 8 Ann. c.
19.

WHEN the Genius of the Nation took a more liberal Turn, and Learning had gained an Establishment among Us, it was then the Office of the *Legislature*, to make such Provisions for its Encouragement, as to them should seem proper. And accordingly they *have* done so, by the Statute of * *Queen Ann*; which Lord *Hardwicke* is said to have stiled (in the Case of *Midwinter et al. v. The Scotch Booksellers*) “an *universal Patent* for “Authors.”

Let Us look, then, into that Act of Parliament; and see if We can not find in it, more authentic Declarations of the Law concerning this Right, than in the Charters and By-Laws of the Stationers Company; the Proclamations and Patents of the Crown; the Decrees of the Star-Chamber; the Ordinances made during the Usurpation; or the Licensing Act of C. 2. This Statute of *Queen Ann* was made by a legal and regular Authority, without any Mixture of Political Views.

The Counsel for the Plaintiff were aware how decisive this Statute was against them: And therefore they endeavoured to preclude all Arguments from it. They urged the Saving Clause, in the 9th Section, “That Nothing in that Act shall extend to “any Right that the Universities or any Persons have in any “Book already printed, or after to be printed.”

But this saving Clause seems to me to have no View at all to any *General* Question of Law, or to any *General* Claim. It is not meant as a Saving of any Right or Claim which *Authors* might have at *Common* Law. That would have rendered the whole Act of Parliament of no Effect at all, and defeated the very End for which it was made. It is only pointed at the printing and reprinting of *particular* Books.

The Design of the Statute was to vest a *temporary* Copy-Right in Authors, and to establish *that* Right for a limited Time. But if it had said, after all, that it should not have any Effect *at all* upon the Possessions of Authors, what a laborious Nullity would it be! The Proviso is, that the Act should not confirm or prejudice any particular Claim. It don't relate to *Authors*; but to the University Privileges of Printing.

The University will hardly be considered as an Author. But the Universities had the Privilege of printing and reprinting particular Books; of which there were several Sorts, (as Bibles, Common-Prayer, and Law-Books;) and the University of *Cambridge*,

bridge, a more general Licence: And as some of these Patents might be *disputable*, (as we have lately seen in the Case of *Baskett v. The University of Cambridge*,) and the Patent-Rights stood on a different Foundation from that of the *Copy-Rights vested in Authors*; it was a proper Provision, “that this Act should *not* “*affect* these *particular* Claims; nor either *establish* or *abridge* “the Duration of *Patents*.”

So, in one of the Ordinances of the Parliament for laying a Restriction on Printing, there is a like Proviso, “That that Ordinance and One made in 1642, should not extend to infringe “the just Privileges of the Printers of the two Universities.”

So in the Statute of 7. 1. * against Monopolies, there is a ^{* 21 J. 1. c. 3. § 10.} Clause, “that it shall not extend to any Patents or Grants of Privilege of for or concerning Printing;” that is, that such Patents or Grants should neither be prejudiced nor confirmed by that Statute.

It was said, “that this Statute of *Queen Ann* was merely “*declaratory of a Common-Law Right*; and that it was *accumulative*, and only introduced some *additional Remedies*.”

But to me, from the *Title* quite to the End of this Act, it seems very clearly to be a plain Declaration “that *no* such Right “exists at *Common Law*.” The Act seems to me, manifestly designed to *vest* the Property in the Author and Publisher *during the Time* limited and prescribed by it. The Design seems plainly and professedly to be, to give *Encouragement* to Learning by some *New Advantage*; namely, by *vesting* the Copy in the Author and Publisher during a certain Time. The Title is, “An Act for “the Encouragement of Learning, by *vesting* the Copies of “printed Books in the *Authors* or *Purchasers* of such Copies, “*during* the Time therein mentioned:” And by the enacting Clause, there is a Right given in those already printed, for Twenty-one Years *from* the 10th of *April* 1710.

Does not this plainly imply, that they had *no* such Right *before* the 10th of *April* 1710? How can it be said, “that this “Act *vested* that Right,” if they had the *same* Right *before*, by *Common Law*? Why should the enacting Clause particularly provide that after the 10th of *April* 1710, the Author or Publisher should have the sole Right of printing for Twenty-one Years and no longer, Books then in Print; and for Fourteen Years and no longer, Books then composed but not printed; if they had it *before*?

This plainly implies that they had *no such Right before 10th of April 1700*. There is not one Clause, one Expression, throughout the whole Act, that hints at a prior exclusive Right in Authors to an *eternal* Monopoly. The Monopoly is particularly limited to a certain Number of Years, and that it shall continue no longer. The only Prolongation that is given, is, that if the Author shall be alive after Fourteen Years, the Privilege shall recur to him for another Fourteen Years. But both these Terms are *created* by the Act; and both of them *limited* to Fourteen Years.

* V. sect. 4.
(since repealed by 12 G.
2. c. 36. § 3.)

This Statute also provided * for limiting and settling the *Price* of Books. But if Authors had a sole Right to their Copies for ever, What *Encouragement* would they receive from this Provision? It would be a strange Sort of *Encouragement*; to *abridge* an actual Right before subsisting in them; to *deprive* them of the natural Right (which every other Person has) of fixing the *Price* of the Goods he sells; and to subject the Value of their *Property* to the Regulation of *Others*.

The Penalty does not seem much calculated for the Encouragement of the Author. For, the Books are to be forthwith *dismasked*, and made Waste-Paper of: And the Forfeiture is to go, One Half to the King; the other, to the Informer; but no Part of it to the Author.

Were *these* the Encouragements which Authors were so anxious to obtain? So little do they regard them, that we scarce ever hear of an Instance of their resorting to those Penalties.

How then can we consider this Act, but as *vesting in Authors* a *Property* in their Works, which they *had not before*?

After examining the several Clauses and Expressions contained in it, I can not but conclude that the Legislature had no Notion of any such Things as Copy-Rights, as existing for ever at Common Law: But that, on the contrary, they understood that Authors could have *no* Right in their Copies *after* they had made their Works *public*; and meant to *give* them a Security which they supposed them *not* to have had before. And that this was the Idea of the Legislature, is plainly discoverable from the Debate before it passed into a Law.

The Booksellers petitioned, "that they might have their "Right *secured* to them." The Committee *expunged* that Word; and substituted "*vesting*," in the Place of "*securing*," (as it had stood in the original Bill :) And the House determined the Title should

should be “ for the Encouragement of Learning, by *vesting* the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.” And afterwards, when the Lords would have struck out the Clause restraining the Authors with regard to the Price, they came to a Conference. The Commons said, they thought it reasonable that some Provision should be made, “ that extravagant Prices should not be set on useful Books.” And the Lords gave it up. It certainly appeared to the Legislature, that abstractedly from this Statute, Authors had *no exclusive Right whatever*; and consequently, must be very far from having any Pretensions to an eternal Monopoly: But that, as the Act gave them a *temporary* Monopoly for a limited Time, it might be reasonable to make the Provisions and Restrictions contained in it; and they would then have a proper Operation. But if this Act of Parliament was *merely a Recognition* of a *Common-Law* Right, every Person who had such a *Common-Law* Right might wave the Benefit of the Act: And then the Restrictions in it would have no Operation, as to *them*.

Upon the Whole, It seems evident to me, that this Claim can not possibly be maintained on either of the Grounds on which it was argued. That, far from being warranted by the general Principles of Property, every one of those Principles are flatly *against* it. That it can not be a Part of the *Common Law* of *England*; the Existence whereof is *immemorial*, and long *antecedent* to every Circumstance of *literary Claim*.

I should have here closed what I had to say; and am indeed ashamed to have taken up so much Time. But the Singularity of my Opinion may seem to require some Apology, as I have the Misfortune to be *Alone* in it. I can safely say, that, be it ever so erroneous, it is my *sincere* Opinion. The *Grounds* on which I have formed it must be judged of, by *Others*: To *me*, they appear sufficient.

As the Counsel for the Plaintiff have urged the Unfavourableness of it to Men of Learning, I will add a few Words upon *that* Topic; and also upon the inconvenient *Consequences* the Public may feel, in case the Plaintiff's Claim should be *established*.

It was argued, “ that this Allowance of a perpetual exclusive Right to Authors would *encourage Publications*, and be of Use for the *explaining and cultivating* of Learning and Science.”

It is of Use, certainly, that Learning and Science, and all valuable Improvements should be encouraged, and every Man's Labour properly rewarded. But every Reward has its proper Bounds:

Bounds : And an entire Monopoly for Fourteen, or if the Author remains alive, for Twenty-eight Years, seems Encouragement enough for his Labours : At least, the Legislature have thought it sufficient Encouragement to them ; and have expressly declared “ They shall have it *no longer*.” And have *we* Power to *control* that Authority ; and to say, in direct *Opposition* to the Statute, “ that they *shall* have it longer ?—that they shall have it *for ever* ?” If the Encouragement which the *Legislature* has given will not satisfy Authors, it is not *our* Province to extend it further. But I can never entertain so disgraceful an Opinion of learned Men, as to imagine the Profits of Publication for Twenty-eight Years will *not* content them. I will not believe, “ that “ Nothing will induce them to write, but an *absolute perpetual* “ *Monopoly* ;” “ That they have *no Benevolence* to Mankind ; *no* “ *honourable Ambition of Fame* ; *no Incentive* to communicate “ their Knowledge to Others, but the most *avaricious and mer-* “ *cenary* Motives.” From Authors so very *illiberal*, the Public could hardly expect to receive much Benefit.

On the other Hand, let Us look to the Consequences of *establishing* this Claim. Instead of tending to the Advancement and the Propagation of Literature, I think it would *stop* it ; or at least, might be attended with great Disadvantages to it.

* In Donald-
son's Case.

It was a just Observation of Lord Northington*, “ that it “ might be *dangerous* to vest an *exclusive Property* in Authors. “ For, as that would give them the *sole Right* to *publish*, it would “ also give them a Right to *suppress* : And then those Booksel- “ lers who are possessed of the Works of the Best of our Au- “ thors, might *totally suppress* them.” The Public have *no Tie* upon Authors or Booksellers, to *oblige* them to keep a *sufficient Number* of Copies printed.

It was said, “ that *if* the Authors or Booksellers did *not* take “ Care to print a sufficient Number of Copies, it would be *aban-* “ *doning the Copy*.”

To me, however, such *Abandoning of a Copy* in a Species of Property like this, seems impossible. For, if there is any *Abandoning* the Property at all, it must be upon *this Foundation*, “ That no Man has a Right to publish the *Sentiments* of an Au- “ thor without his Consent :” And it is in that Light alone, that an Author can claim the *sole Right* of Publication. Now, suppose an Author should drop all Design of making further Gains to himself, and discontinue the Publication ; he may in- sist “ the *Sentiments are His*, and no other Person shall publish “ *his own Thoughts* without his Content ; and that notwith- “ standing he has published them once, he does not choose they “ should

“ should be published any further.” And in *that* Light, what Colour will there be for *extorting* his Consent, under the Idea of an *Abandonment*?

But admitting this extraordinary Proposition “ That an Author *may abandon the future Profits* of Publication ;” (that is, may abandon what he was *never possessed of*;) we should still find, the Public would be laid under *Difficulties*, and would be liable to *disagreeable Consequences*. It must rest on Circumstances capable, not only of erroneous, but arbitrary Interpretations. This must produce Confusion and Danger. What a Hazard must every Man *risque*, who ventures from mere argumentative Circumstances to *infer an Abandonment*; and under that Idea, proceeds to publish! Whatever Conclusions he may have formed to *Himself*, he knows not what Light it may appear in to *Others*; and, after an expensive Litigation about it, may find it at last determined against him.

But besides these Difficulties—Supposing the Author should *continue* the Publication, and *print a sufficient Number* of Copies; but should fix such an *exorbitant Price* upon his Books, as to lock the Work up from the general Bulk of Mankind; yet it can not be said “ He had *abandoned* his Property.” In this Case, all the Learning and all the Advantage would be *confined to a Few*; and yet the Public has no Remedy against it; and *no other* Person must presume to publish this Work.

The *Legislature* were aware of this; and therefore established an Authority in proper Persons, by the Statute of *Queen Ann**, * Vide § 4. to *limit and settle the Price* of Books. But if Authors and their Assignees were to be allowed a *sole* Right of publishing, as being out of the Act, and having a distinct and exclusive Right still remaining in them, that Provision would be totally *nugatory*; and it would be still in the Power of a Bookseller to set an extravagant Price on useful Books.

Can this *exclusive* Right of Publication, this Monopoly which claims an entire Dominion over it, and puts an absolute *Prohibition* on every *other* Person, be deemed an Encouragement to Learning, and to tend to the Advancement and Propagation of it?

There is *another* Light too, in which the Consequences of this Claim may be highly injurious to the Public: And that is the *Restraints* it will lay upon the natural Rights of Mankind in the Exercise of their Trade and Calling.

It is every Man's natural Right, to follow a lawful Employment for the Support of himself and his Family. Printing and

Bookselling are lawful Employments. And therefore every Monopoly that would intrench upon these lawful Employments is a Restraint upon the Liberty of the Subject. And if the printing and felling of every Book that comes out, may be *confined to a Few*, and *for ever with-held* from all the *Rest* of the Trade; What Provision will the *Bulk* of them be able to make for their respective Families?

There is yet *another Mischief* that results from this Claim; the Door it will open for *perpetual Litigations*.

* Vide ante,
p. 2361,
2362.

I have before * observed the dangerous Snares which this *ideal Property* will lay, as it carries *no proprietary Marks* in itself; and is not bound down to any formal *Stipulations*. So *obscure* a Property, (especially after the Work has been a long While published) might lead many Booksellers into many *Litigations*: And in such Litigations, many doubtful Questions might arise; such as—"Whether the Author of the Work did not *intend it as a Gift* to the Public"—"Whether, *since that*, he has not *abandoned* it to the Public"—"And at *what Time*."——Disputes also might arise *among Authors themselves*—"Whether the Works of *one* Author were or were not the *same* with those of *another* Author; or whether there were only *colourable Differences*:"—(A Question that would be liable to great Uncertainties and Doubts.) So, "Whether those who should compile Notes on a Publication, and should insert the Text, should be liable to an Action for it:" Or if the Notes were good, the Author might refuse the Publication of them †.

† Qu. of this
Part. For,
here, I was
out of Court
a few Mi-
nutes.

I wish as sincerely as any Man, that learned Men may have all the Encouragements, and all the Advantages that are consistent with the general Right and Good of Mankind. But *if* the Monopoly now claimed be *contrary* to the *great Laws of Property*, and totally *unknown to the ancient and Common Law of England*; *If* the Establishing of this Claim will directly *contradict the Legislative Authority*, and introduce a *Species of Property contrary* to the End for which the whole System of Property was established; *If* it will tend to *embroil the Peace* of Society, with frequent Contentions;—(Contentions most highly disfiguring the Face of Literature, and highly disgusting to a liberal Mind;) *If* it will hinder or suppress the Advancement of Learning and Knowledge; And lastly, *If* it should *strip the Subject of his natural Right*; *If* these, or *any* of these *Mischiefs* would follow; I can never concur in establishing such a Claim.

THE LEGISLATURE have provided the proper Encouragements for Authors; and, at the same Time, have guarded against all these *Mischiefs*. To give that legislative Encouragement a *liberal*

beral Construction, is my *Duty* as a Judge; and will ever be my *own* most willing *Inclination*. But it is *equally* my *Duty*, not only as a *Judge*, but as a *Member of Society*, and even as a *Friend to the Cause of Learning*, to support the *Limitations of the Statute*.

I shall therefore conclude, in the Words of the Act of Parliament, "That the Author or Purchaser of the Copy, shall have the sole Right for the *particular Term* which the Statute has granted and limited; *but NO LONGER*:" And consequently, That the Plaintiff, who claims a *perpetual and unbounded Monopoly*, has NO LEGAL RIGHT to recover.

LORD MANSFIELD (not intending to go into the Argument) said——

THIS is the first Instance of a *final* Difference of Opinion in this Court, since I sat here. Every Order, Rule, Judgment, and Opinion, has *hitherto* been *unanimous*.

That ‡ Unanimity never could have happened, if we did not among ourselves communicate our Sentiments with great Freedom; if we did not form our Judgments without any Prepossession to first Thoughts; if we were not always open to Conviction, and ready to yield to Each Other's Reasons.

‡ Except in this, and one other Case now depending (by Writ of Error) in the House of Lords, where

Mr. Justice YATES differed from the other Three, Every Rule, Order, Judgment, and Opinion, has, to this Day, been (as far as I can recollect) unanimous. This gives Weight and Dispatch to the Decisions, Certainty to the Law, and infinite Satisfaction to the Suitors: And the Effect is seen by that immense Business which flows from all Parts, into this Channel; and which we who have long known Westminster-hall, behold with Astonishment; the rather, as during this Period, all the other Courts have been filled with Judges of unquestionable Integrity, eminent Talents, and distinguished Abilities.

We have all equally endeavoured at that Unanimity, upon this Occasion: We have *talked* the Matter over, several Times. I have communicated my Thoughts at large, *in Writing*: And I have *read* the three Arguments which have been now delivered. In short, we have *equally tried* to convince, or be convinced: But, in vain. We *continue to differ*. And whoever is Right, *Each* is bound to abide by and deliver *that* Opinion which he has formed upon the fullest Examination.

His LORDSHIP observed, that *to repeat* the two first Arguments, or go over the same Topics again, would be idle and nugatory, when he had already declared "that he read, approved, and previously concurred in them:" And to be particular in opposing or answering the several Parts of the last Argument (though he differed from the Conclusions of it,) would be indecent, and look too much like Altercation.

HE therefore only desired to *refer* to the two first Arguments, *without* actually repeating them; and that he might be understood as if he had spoken the Substance of them, and fully adopted them. After which, he expressed himself to the following Effect.

From Premisses either expressly admitted, or which can not and therefore never have been denied, Conclusions follow, in my Apprehension, *decisive* upon all the Objections raised to the *Property* of an Author, in the *Copy of his own Work*, by the *Common Law*.

I use the Word "COPY," in the *technical* Sense in which that Name or Term has been used for Ages, to signify an *incorporeal Right* to the *sole* printing and publishing of somewhat intellectual, communicated by Letters.

1st. Admission. It has all along been expressly admitted, "that, by the *Common Law*, an Author is intitled to the Copy of his own Work " *until* it has been once printed and published by his Authority;" and "that the Four Cases in Chancery, cited for that Purpose, " are agreeable to the *Common Law*; and the Relief was properly " given, in consequence of the legal Right."

The Property in the Copy, *thus abridged*, is *equally* an incorporeal Right to print a Set of intellectual Ideas or Modes of Thinking, communicated in a Set of Words and Sentences and Modes of Expression. It is *equally* detached from the Manuscript, or any other *physical* Existence whatsoever.

The Property thus abridged is *equally* incapable of being violated by a Crime *indictable*. In like Manner, it can only be violated by Another's printing without the Author's Consent: Which is a *Civil Injury*.

The only *Remedy* is the same; by an Action upon the Case, for Damages, or a Bill in Equity for a Specific Relief.

No Action of *Detinue*, *Trover*, or *Trespass quare vi et armis*, can lie; because the Copy *thus abridged* is *equally* a Property in *Notion*, and has no *Corporeal tangible* Substance.

No *Disposition*, no *Transfer* of Paper upon which the Composition is written, marked, or impressed, (though it gives the *Power* to print and publish,) can be construed a *Conveyance of the Copy*, without the Author's express *Consent* " *to print and publish*;" much less, *against* his Will.

The Property of the Copy, *thus narrowed*, may *equally* go down from Generation to Generation, and possibly continue for Ever; though neither the Author nor his Representatives should have any Manuscript whatsoever of the Work, Original Duplicate, or Transcript.

Mr. Gwynn was intitled, undoubtedly, to the *Paper* of the Transcript of Lord Clarendon's History: Which gave him the *Power* to print and publish it, after the Fire at *Petersham*, which destroyed one Original. This *might* have been the *only* Manuscript of it in being. Mr. Gwynn might have thrown it into the Fire, had he pleased. But, at the Distance of near a Hundred Years, the *Copy* was adjudged the Property of Lord Clarendon's Representatives; and Mr. Gwynn's Printing and Publishing it, *without their Consent*, was adjudged an *Injury to that Property*; for which, in different Shapes, he paid very dear.

Dean Swift was certainly Proprietor of the *Paper* upon which *Pope's* Letters to him were written. I know, Mr. *Pope* had *no* Paper upon which they were written; and a very imperfect Memory of their Contents: Which made him the more anxious to stop their Publication—; Knowing that the Printer had got them.

If the Copy belongs to an Author, *after* Publication; it certainly belonged to him, before. But if it does not belong to him after; where is the Common Law to be found, which says “there is such a Property before?” All the Metaphysical Subtilities from the Nature of the Thing may be *equally* objected to the Property before. It is *incorporeal*: It relates to Ideas detached from any *Physical* Existence. There are *no Indicia*: Another may have had the same Thoughts upon the same Subject, and expressed them in the same Language *verbatim*. At what Time, and by what Act does the Property commence? The same String of Questions may be asked, upon the Copy before Publication: Is it *real* or *personal*? Does it go to the *Heir*, or to the *Executor*? Being a Right which can only be defended by Action, is it, as a Chose in Action, *assignable*, or not? Can it be *forfeited*? Can it be taken in *Execution*? Can it be *vested in the Assignees* under a Commission of Bankruptcy?

The Common Law, as to the Copy before Publication, can not be found in Custom.

Before 1732, the Case of a Piracy *before* Publication never existed: It never was put, or supposed. There is not a Syllable about it to be met with any where. The Regulations, the Or-

dinances, the Acts of Parliament, the Cases in *Westminster-Hall*, all relate to the Copy of Books *after* Publication by the Authors.

Since 1732, there is not a Word to be traced about it ; except, from the four Cases in Chancery.

* See the Note at the End of this Case, as to the particular Time when it was first introduced into this Kingdom.

Besides, If all *England* had allowed this Property Two or Three Hundred Years, the same Objection would hold, “ that the Usage is *not immemorial* :” For, Printing was introduced in the Reign of *Edw. 4th*, or *H. 6th*. *

From *what Source*, then, is the *Common Law* drawn, which is admitted to be so clear, in respect of the Copy *before* Publication ?

From *this Argument*—Because it is *just*, that an Author should reap the pecuniary Profits of his own Ingenuity and Labour. It is *just*, that Another should not use his Name, without his Consent. It is *fit*, that he should judge when to publish, or whether he ever will publish. It is *fit* he should not only choose the Time, but the Manner of Publication ; how many ; what Volume ; what Print. It is *fit*, he should choose to whose Care he will trust the Accuracy and Correctness of the Impression ; in whose Honesty he will confide, not to foist in Additions : With other Reasonings of the same Effect.

I allow them *sufficient* to shew “ it is agreeable to the Principles of Right and Wrong, the Fitness of Things, Convenience, and Policy, and therefore to the Common Law, to protect the Copy *before* Publication.”

But the *same* Reasons hold, *after* the Author has published. He can reap no pecuniary Profit, if, the next Moment after his Work comes out, it may be pirated upon worse Paper and in worse Print, and in a cheaper Volume.

The 8th of *Queen Ann* is no Answer. We are considering the *Common Law*, upon Principles *before* and *independent* of that Act.

The Author may not only be deprived of any *Profit*, but *lose* the Expence he has been at. He is no more Master of the Use of his own *Name*. He has no Control over the *Correctness* of his own Work. He can not *prevent Additions*. He can not *retract Errors*. He can not *amend* ; or *cancel* a faulty Edition. Any One may print, pirate, and perpetuate the *Imperfections*, to the Disgrace and against the Will of the Author ; may propagate Sentiments under his Name, which he *disapproves*, *repents* and is *ashamed of*. He can exercise no Discretion as to the *Manner* in which, or the *Persons* by whom his Work shall be published.

For these and many more Reasons, it seems to me just and fit,
“ to protect the Copy *after* Publication.”

All Objections which hold as much to the Kind of Property *before*, as to the Kind of Property *after* Publication, go for Nothing: They prove *too much*.

There is *no peculiar* Objection to the Property *after*, except,
“ that the Copy is *necessarily made Common*, after the Book is
“ once published.”

Does a Transfer of Paper upon which it is *printed*, necessarily transfer the Copy, more than the Transfer of Paper upon which the Book is *written*?

The Argument turns in a Circle. “ The Copy is made Common, because the Law does not protect it: And the Law can
“ not protect it, because it is made Common.”

The Author does not mean to make it Common: And if the Law says “ He ought to have the Copy after Publication,” It is a several Property, easily protected, ascertained, and secured.

THE WHOLE then must finally resolve in this Question,
“ Whether it is agreeable to *Natural Principles*, Moral *Justice*
“ and *Fitness*, to allow him the Copy, *after* Publication, as well
“ as *before*.”

The *general Consent* of this Kingdom, for Ages, is on the *Affirmative* Side. The *Legislative* Authority has *taken it for granted*; and interposed *Penalties* to *protect it for a Time*.

The single Opinion of such a Man as *Milton*, speaking, after much Consideration, upon the very Point is stronger than any Inferences from gathering Acorns and seizing a vacant Piece of Ground; When the Writers, so far from thinking of the very Point, speak of an imaginary State of Nature before the Invention of Letters.

The *judicial Opinions* of those eminent Lawyers and Great Men who *granted or continued* INJUNCTIONS, in Cases *after* Publication, *not within* 8 *Queen Ann*; uncontradicted by any Book, Judgment, or Saying; must weigh in *any* Question of Law; much more, in a Question of mere Theory and Speculation as to what is agreeable or repugnant to *Natural Principles*. I look upon *these* Injunctions, as *equal* to any final Decree.

Whoever

Whoever has attended the Court of Chancery, knows that if an Injunction in the *Nature* of an Injunction *to stay Waste*, is granted, upon Motion, or continued after Answer, it is in vain to go to Hearing. For, such an Injunction *never* is granted upon Motion, *unless* the *legal Property* of the Plaintiff be *made out*; nor continued after Answer, *unless* it still *remains clear*, allowing all the Defendant has said. In *such* a Case, the Defendant is always advised, either to *acquiesce*, or *appeal*: For, he never can make a better *Defence* than is stated upon his own Answer.

This Case is not sent hither from the Court of Chancery, upon any Doubt of theirs. There never was a Doubt in the Court of Chancery, till a Doubt was raised there from Decency, upon a *supposed* Doubt in *this* Court, in the Case of *Tonson and Collins*. There is not an Instance of an Injunction refused, till it was refused upon the Grounds of that Doubt. The Court of Chancery *never* grant Injunctions in Cases of this Kind, where there is any *Doubt*. Therefore they refused it, when they *thought* there was a Doubt. That Case was argued twice, with Solemnity: And after the second Argument, it was referred to the Exchequer-Chamber, to be argued before all the Judges.

That Reference did not arise from any Difference of Opinion, or Difficulty among Us. On the contrary, we suspected Collusion; and that if we gave Judgment for the Plaintiff, there certainly would be *no* Writ of ERROR. We wished to take the Opinion of *All* the Judges. We were afterwards clearly informed of the Truth of the Collusion: And therefore the Cause proceeded no further.

But while it hung under this *Appearance* of Difficulty, there was sufficient Ground for the Court of Chancery to say, "the *Property* was *doubtful*." They did not send it to Law: They left the Party to follow his *legal* Remedy. A *doubtful* legal Title must be tried at Law, before it can be made the Ground of an Injunction. Injunctions of *this* Kind are rightly and properly refused. In a *doubtful* Case, it would be *Iniquity* to grant them; Because, if it should come out "that the Plaintiff has *no* legal Title," the Defendant is injured by the Injunction, and can have no Reparation.

If it is agreeable to Natural Principles, to allow the Copy *after* Publication, I am warranted by the Admission which allows it *before* Publication, to say, "This is *Common Law*."

There is another *Admission* equally conclusive.

It

It is, and has all along been admitted, "that by the *Common* 2d Admission.
 " Law, the KING's Copy continues *after* Publication; and that
 " the unanimous Judgment of this Court, in the Case of *Baskett* * Mich. 1758.
 " and *The University of Cambridge* *, is right." 32 G. 2 V.
 ante, p. 661.

The *King* has no Property in the Art of Printing. The ridiculous Conceit of *Atkins* was exploded at the Time.

The *King* has no Authority to restrain the Press, on Account of the Subject-Matter upon which the Author writes, or his Manner of treating it.

The *King* can not, by Law, grant an exclusive Privilege to print any Book which does not belong to himself.

Crown-Copies are, as in the Case of an Author, civil Property: which is deduced, as in the Case of an Author, from the King's Right of Original Publication. The *Kind* of Property in the Crown or a Patentee from the Crown, is just the *same*; incorporeal, incapable of Violation but by a Civil Injury, and only to be vindicated by the same Remedy, an Action upon the Case, or a Bill in Equity.

There were no Questions in *Westminster-Hall*, before the *Restoration*, as to *Crown Copies*. The *Reason* is very obvious: It will occur to every One that hears me. The *Fact*, however, is so: There were none, before the *Restoration*.

Upon every Patent which has been litigated *since*, the Counsel for the Patentee, (whatever else might be thrown out, or whatever Encouragement they might have, between the *Restoration* and *Revolution*, to throw out Notions of Power and Prerogative,) have tortured their Invention, to stand upon PROPERTY.

Upon *Rolle's Abridgment*, They argued from the *Year-Books*, which are there abridged, "that the *Year-Books* having been " compiled at the *King's Expence*, were the *King's Property*, and " therefore the Printing of them belonged to his Patentee."

Upon *Croke's Reports*, they contended, "that the *King paid* " the Judges who made the Decisions: *Ergo*, the Decisions were " his." The Judges of *Westminster-Hall* thought, they belonged to the *Author*; that is, to the Purchaser from, or the Executor of the Author: But, so far the Controversy turned upon Property.

In *Seymour's Case*, 1 *Mod.* 256. (who printed *Gadbury's Almanac*, without Leave of the Stationers Company, who had a
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Patent for the sole printing of Almanacs,) *Pemberton* resorted to *Property*. He argued (besides arguing from the Prerogative,) "that an Almanac has *no certain Author*: Therefore the *King* has the *Property*; and by Consequence, may grant his *Property*." It was far fetched: And it is truly said, "that the Consequence did *not* follow." For, if there was no certain Author, the *Property* would *not* be the King's, but *Common*. *Pemberton* was a very able Lawyer; and saw the Necessity of getting at *Property*, if he could make it out.

All the Decrees in Chancery, and the Judgments at Common Law upon *Almanacs*, are now out of the Case, and all the Doctrine of Prerogative rejected, by what was done in the Case of *The Stationers Company* and *Partridge*.

It came on, in the Year 1709, before Lord *Cowper*, on continuing the Injunction. There is no Report of it, I believe, in Print: At least, I have not seen any. I have read the Bill and Answer. The Bill puts it upon all the Prerogative Notions of Power; and insists, that the King's Patentee had a sole exclusive Right of printing Almanacs. The Answer insists, that these were extravagant illegal Notions; that they were taken up at Times when the Prerogative ran high, and when the dispensing Power was allowed: And it insists, that the Question ought, since the Revolution, to be argued upon proper Principles, consistent with the Rights and Privileges of the Subject. The Defendants denied the Authority of all the Cases stated by the Bill, as far as they went upon *Prerogative* Right. Lord *Cowper* continued the Injunction till Hearing. I have Office-Copies of all the Orders and Pleas that were cited: I dare say, I have Thirty or Forty of them. It appears, that these Decrees were all read; and that the Judgment of the House of Lords was read and gone through. Lord *Harcourt* afterwards heard the Cause. He did not choose, in a Case about Almanacs, to decide upon Prerogative. He therefore made a Case of it, for the Opinion of this Court; Lord *Parker* being then Chief Justice. This Court, so far as it went, inclined against the Right of the Crown in Almanacs. But, to this Hour, it has never been determined: And the Injunction granted by Lord *Cowper* still continues.

I have *Salkeld's* Manuscript Report (and have had it many Years) of what passed in this Court in the Course of the Argument of this Case of *The Company of Stationers* against *Partridge*. I do not know whether it is got into Print: I have not seen it in Print. Mr. *York* had a Copy of it, when he argued the Case of *The University of Cambridge* and *Baskett*. Mr. *Salkeld* argued for the Defendant *Partridge*: Sir *Peter King*, for the Plaintiffs.

I will state to you, so far as is material to the Argument, how they put it, and the only Grounds that they thought tenable.

Mr. *Salkeld*, after positively and expressly denying any Prerogative in the Crown over the Press, or any Power to grant any exclusive Privilege, says, “ I take the Rule, in all these Cases, to be, That where the Crown has a *Property* or *Right of Copy*, the King may grant it. The Crown may grant the sole Printing of *Bibles in the English Translation*; because it was made at the King’s Charge. The same Reason holds, as to the *Statutes*, *Year-Books*, and *Common-Prayer-Books*.”

Sir *Peter King*, for the Plaintiffs, argues thus—(throwing out, at the same Time, the Things that I have already mentioned; though he don’t seem to be very serious in it—) “ I argue, that if the Crown has a Right to the Common-Prayer-Book, it has a Right to every Part of it. And the Calendar is a Part of the Common-Prayer-Book. And an Almanac is the same Thing with the Calendar, &c.”

Parker, Chief Justice, speaks to Nothing said at the Bar, but only “ whether the Calendar is Part of the Common-Prayer-Book.” And as to that, he goes Back as far as to the Council of *Nice*; and doubts whether it is, or rather indeed thinks that it is not Part of it: He says, It may be an *Index*, but is no Part of it.

Mr. Justice *Powell* says—“ You must distinguish this from the Common Cases of Monopolies; by shewing some *Property* in the Crown, and bringing it within the Case of the Common-Prayer-Book.” And he rather inclined to think, “ that Almanacs might be the King’s;” because there is a *Trial by Almanacs*.

To which, Lord *Parker* replied, “ that he never heard of such a Thing as a *Trial by Almanac*.”

They leave it upon this. It stood over, for another Argument, to see if they could make it like the Case of the Common-Prayer-Book. I don’t know what happened afterwards: But there never was any Judgment; and though I have made strict Inquiry, I don’t find that there was ever any Opinion given.

I heard Lord *Hardwicke* say what Mr. Justice *Willes* has quoted, as to these Arguments from Property in Support of the King’s Right, necessarily inferring an *Author’s*.

The

The Case of *Baskett* and *The University of Cambridge* was then depending in this Court, when Lord *Hardwicke* made Use of that Expression or Argument: It has, since, been determined. We had no Idea of any *Prerogative* in the Crown over the Prefs; or of any Power to restrain it by *exclusive* Privileges, or of any Power to control the Subject-Matter on which a Man might write, or the Manner in which he might treat it. We rested upon *Property* from the King's *Right of Original Publication*.

Acts of Parliament are the Works of the *Legislature*: And the Publication of them has always belonged to the King, as the *Executive* Part, and as the *Head and Sovereign*.

The *Art of Printing* has only varied the *Mode*. And, though Printing be within legal Memory, we thought the *Usage* since the Invention of Printing, very material.

Whoever looks into Mr. *Yorke's* Argument, upon which the Opinion of the Court in that Case in a great Measure went, (I do not say *throughout*, but in a *great Measure*,) will see the great Pains he takes to shew the Original Property in the Crown.

Though the King may grant a *concurrent* Right; (For, in that Case the Grant was of a concurrent Right, and he might grant it to Ten Thousand; he might grant it to every Member of the Stationers Company; he might grant it to every Bookseller;) We had no Idea "that the first Edition of Acts of Parliament made the Copy *Common*." And yet any Man may transcribe an Act of Parliament, or a Record: And any Person may make laborious Searches and Abstracts from Records, and have a Right to print them.

Lord *Hardwicke* had before reasoned in the same Way, in the Case of *Manby and Others* against *Owen and Others*, on 8th April 1755, relating to the Sessions-Paper. The Plaintiffs had bought the Sessions-Paper of my Lord Mayor, and had (I think) given him an Hundred Guineas for it. And upon an Affidavit "that the Lord Mayor had always appointed the Printers of that Paper; and that it was usual for the Lord Mayor to take a Sum of Money for it; and that the Defendant had pirated it;" Lord *Hardwicke* considered the Grant as Property in the Copy, and granted the Injunction upon the Foot of *Property*; and never dreamt "that the first Edition of it made it *Common*." This was acquiesced under: And the Defendants were not advised to proceed further. Nothing is more manifest, than that the Injunction proceeded upon the Infringement of the Plaintiff's Property: For, as a *Contempt of the Court* of the Old Bailey, the Court

of *Chancery* would not have interfered. But they were of Opinion
 “ that the *Copy* was *transferred* to the Plaintiff, and that it was
 “ not made *Common* by the first Publication.”

If the Common Law be so in *these* Cases, it must also be so in
 the Case of an *Author*. All the Reasoning “ that subsequent
 “ Editions should be *correct*,” holds equally to an *Author*. His
Name ought not to be used, against his Will. It is an *Injury*, by
 a faulty, ignorant and incorrect Edition, to disgrace his Work
 and mislead the Reader.

The Copy of the *Hebrew* Bible, the *Greek* Testament, or the
Septuagint does not belong to the King : It is *Common*. But the
English Translation he *bought* : Therefore it has been concluded
 to be *his Property*. If any Man should turn the *Psalms*, or the
 Writings of *Solomon*, or *Job*, into Verse, the King could not
 stop the Printing or Sale of such a Work : It is the Author's
 Work. The King has no Power or Control over the Subject-
 Matter : His Power rests in *Property*. His whole Right rests
 upon the Foundation of *Property in the Copy* by the *Common Law*.
 What *other* Ground can there be for the King's having a Pro-
 perty in the *Latin Grammar*, (which is One of his ancientest
 Copies,) than that it was originally composed at *his Expence* ?
 Whatever the *Common Law* says of *Property* in the KING's Case,
 from *Analogy to the Case of Authors*, must hold *conclusively*, in my
 Apprehension, *with regard to* AUTHORS.

I always thought the Objection from the * Act of Parliament, * 8 Ann.
 the most *plausible*. It has generally struck, at *first View*. But, c. 19.
 upon *Consideration*, It is, I think, impossible to *imply* this Act
 into an *Abolition* of the Common-Law Right, if it *did* exist; or
 into a Declaration “ that no such Right ever existed.”

The BILL was brought in, upon the Petition of the Proprie-
 tors, to *secure* their Property *for ever*, by *Penalties*; the only Way
 in which *they thought* it *could* be secured; having had *no Experi-
 ence of any other*; there being no Example of an Action at Law
 tried, or any Idea “ that a Bill would lie for an Injunction and
 “ Relief in Equity.”

An Alteration was made in the Committee, to *restrain* the *per-
 petual* into a *temporary* Security.

The Argument drawn from the Clause to regulate the * Price
 of Books, can not hold. That Clause goes to *all* Books; is *per-
 petual*; and follows the Act of H. 8. †

* Sect. 4. now
 repealed (by
 12 G. 2. c.
 36. § 3.)
 † 25 H. 8. c.
 15. § 4.

• V. sect. 1. The Words “ *no longer* ” * add Nothing to the *Sense*; which is exactly the same, whether these Words are added, or not.

† V. Title— The Word “ *vesting* ” †, in the Title, can not be argued from, as declaratory “ that there was *no* Property *before*.” The Title is but once read; and is no Part of the Act. In the *Body*, the Word “ *secured* ” is made Use of.

Had there been the least Intention to *take* or *declare* away every Pretence of Right at the *Common Law*, it would have been *expressly* enacted; and there must have been a *new Preamble*, totally different from that which now stands.

But the Legislature has *not* left their Meaning to be found out by *loose Conjectures*. The *Preamble* certainly proceeds upon the Ground of a *Right of Property*, having been *violated*; and might be argued from, as an *Allowance* or *Confirmation* of such a Right at the *Common Law*. The Remedy enacted against the Violation of it being *only temporary*, might be argued from, as *implying* “ there *existed* no Right *but* what was secured by the Act.” Therefore an *express Saving* is added, “ that Nothing in this Act “ contained shall extend or be construed to extend to *prejudice* or “ *confirm* any Right &c.” “ *Any Right* ” is, manifestly, any *other* Right than the *Term* secured by the Act. The Act speaks of *no* Right whatsoever, *but* that of *Authors*, or *derived* from *them*. No *other* Right could possibly be *prejudiced* or *confirmed* by any Expression in the Act. The *Words* of the *Saving* are adapted to this Right: “ *Book or Copy* already printed, or *hereafter* to be “ printed—.” They are not applicable to *Prerogative Copies*. If Letters Patent to an Author or his Assigns could give any Right, they might come under the Generalty of the *Saving*. But, so little was such a Right in the *Contemplation* of the Legislature, that there is not a Word about *Patents* in the *whole* Act. Could they have given any Right, it was not *worth* Saving; because it never exceeded Fourteen Years.

It was strongly urged, “ that a Common-Law Right could “ not exist; because there was *no* Time from which it could be “ said to *attach* or *begin* : ” Whereas the *Statute-Property* was ascertained by and commenced from the *Entry*.

Undoubtedly, the previous Entry is a *Condition* upon which all the Security given by the *Statute* depends: And *if* every Man was intitled to print, without the Author's Consent, *before* this Act, No Body can be questioned for so Printing *since* the Act, before an Entry. Nay, The Offence being *newly created*, it can only

only be prosecuted by the *Remedies prescribed*, and *within the limited Time* of Three Months.

But the Court of *Chancery* has uniformly proceeded upon a *contrary Construction*. They considered the Act, *not* as creating a new Offence, but as giving an *Additional Security* to a *Proprietor* grieved; and gave Relief, *without Regard* to any of the Provisions in the Act, or whether the Term was or was not expired. No *Injunction* can be obtained, *till* the Court is satisfied “ that the Plaintiff has a *clear legal Right*.” And where, for the Sake of the Relief, the Court of Chancery proceeds upon a Ground of *Common or Statute Law*, their Judgments are Precedents of high Authority in *all* the Courts of *Westminster-Hall*.

HIS LORDSHIP adopted and referred to *other* Observations made upon the Act by the two Judges who spoke first:—And then concluded thus—

I desire to be understood, that it is upon *this* Special Verdict, I give my Opinion. *Every Remark* which has been made, as to what *is* and what is *not found*, I consider as *material*. The *Variation* of any *One* of the Circumstances *may* change the Merits of the Question: The Variation of *some*, certainly *would*. Every Case, where such Variation arises, will stand upon its *own particular Ground*; and will *not* be concluded by *this* Judgment.

The SUBJECT *at large* is exhausted: And therefore I have not gone into it. I have had frequent Opportunities to consider of it. I have travelled in it for many Years. I was Counsel in most of the Cases which have been cited from Chancery: I have Copies of all, from the Register-Book. The first Case of *Milton's Paradise Lost* was upon my Motion. I argued the Second: Which was solemnly argued, by One on each side. I argued the Case of *Millar* against *Kincaid*, in the House of Lords. Many of the Precedents were tried by my Advice. The accurate and elaborate Investigation of the Matter, in *this* Cause, and in the former Case of *Tonson* and *Collins*, has *confirmed* me in what I always inclined to think, “ That the Court of Chancery did *right*, in “ giving Relief upon the Foundation of a *LEGAL Property* in “ *Authors*; independent of the Entry, the Term for Years, and “ all the other Provisions annexed to the Security given by the “ Act.”

THEREFORE my Opinion is—“ That JUDGMENT be for * *Vide ante*, “ the PLAINTIFF.” And it must be * *entered* as on the P. 2303. Day of the last Argument of this Case at the Bar.

A Writ of Error was afterwards brought : But the Plaintiff in Error, after assigning Errors, suffered himself to be *non-pross'd*. And the Lords Commissioners, after *Trinity Term* 1770, granted an Injunction.

In the Case of *Donaldsons* against *Becket and Others*, the Matter came before the House of Lords, upon an Appeal from a Decree of the Court of Chancery, founded upon this Judgment : And what appears from the Minutes is as follows—

Die Mercurii, 9 Februarii 1774. Donaldsons against *Becket and Others*.

ORDERED, That the Judges be directed to deliver their Opinions upon the following Questions (*viz.*)

1. Whether at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale ; and might bring an Action against any Person who printed published and sold the same without his Consent ?
2. If the Author had such Right originally, did the Law take it away, upon his Printing and Publishing such Book or Literary Composition : And might any Person afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author ?
3. If such Action would have lain at Common Law, is it taken away by the Statute of 8th *Ann*? And is an Author, by the said Statute precluded from every Remedy, except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby ?

ORDERED, That the Judges do deliver their Opinions upon the following Questions (*viz.*)

Whether the Author of any Literary Composition and his Assigns, had the sole Right of Printing and Publishing the same in Perpetuity, by the Common Law ?

Whether this Right is any way impeached restrained or taken away by the Statute 8th *Ann* ?

Whereupon, the Judges desiring that some Time might be allowed them for that Purpose,

ORDERED, That the further Consideration of this Cause be adjourned till *Tuesday* next; and that the Judges do then attend, to deliver their Opinions upon the said Questions.

Die Martis, 15 Februarii 1774:

The Lord Chancellor acquainted the House, That the Judges differed in their Opinions upon the said Questions.

ORDERED, That the Judges present do deliver their Opinions upon the said Questions, *seriatim*, with their Reasons.

Accordingly,

Mr. Baron EYRE was heard upon the said Question—And

Mr. Baron
Eyre.

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had not the sole Right of first Printing and Publishing the same for Sale; and could not bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That if the Author had such sole Right of first Printing, the Law did take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that any Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Right is taken away by the Statute of 8 *Ann*; and that an Author by the said Statute is precluded from every Remedy except on the Foundation of the said Statute: But that there may may be a Remedy in Equity upon the Foundation of the Statute, independent of the Terms and Conditions prescribed by the Statute, in respect of Penalties enacted thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had not the sole Right of Printing and Publishing the same in Perpetuity, by the Common Law.—And gave his Reasons.

5. Upon

5. Upon the fifth Question, delivered his Opinion—That the Right is impeached restrained and taken away by the Statute 8th *Ann.*—And gave his Reasons.

Mr. Justice
Nares.

Then Mr. Justice NARES was heard upon the said Question.—And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against the Person who printed published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is taken away by the Statute 8 *Ann*; and that an Author by the said Statute is precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is impeached restrained and taken away by the Statute 8 *Ann.*—And gave his Reasons.

Mr. Justice
Ashurst.

Then Mr. Justice ASHURST was heard upon the said Questions.—And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.

2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is not taken away by the Statute of 8th *Ann*; and that an Author by the said Statute is not precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in Perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is not any way impeached restrained or taken away by the Statute of 8th *Ann*.—And gave his Reasons.

Then Mr. Justice ASHURST delivered the Opinion of Mr. Justice BLACKSTON (who was absent, being confined to his Room with the Gout,) upon the said Questions.—And

Mr. Justice
Blackston.

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is not taken away by the Statute of 8th *Ann*; and that an Author, by the said Statute, is not precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.

4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is not any way impeached restrained or taken away by the Statute of 8th Ann.—And gave his Reasons.

ORDERED, That the further Consideration of this Cause, and hearing the Opinion of the rest of the Judges upon the said Questions, be Adjourned till *Thursday* next; and that the Judges do then attend.

Die Jovis, 17 Februarii 1774.

Mr. Justice
Willes.

Mr. Justice WILLES was heard upon the said Questions.—
And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is not taken away by the Statute of the 8th Ann; and that an Author by the said Statute is not precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is not any way impeached restrained or taken away by the Statute of 8th Ann.—And gave his Reasons.

Then Mr. Justice ASTON was heard upon the said Questions. Mr. Justice
Aston.
—And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is not taken away by the Statute of the 8th Ann; and that an Author by the said Statute is not precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is not any way impeached restrained or taken away by the Statute of 8th Ann.—And gave his Reasons.

Then Mr. Baron PERROTT was heard upon the said Questions. Mr. Baron
Perrott.
—And

1. Upon the first Question, delivered his Opinion—That at Common Law an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same; but could not bring an Action against any Person who printed published and sold the same, unless such Person obtained the Copy by Fraud or Violence.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that any Person might afterward reprint and sell, for his own Benefit,

nefit, fuch Book or Literary Composition, againft the Will of the Author.—And gave his Reafons.

3. Upon the third Queftion, delivered his Opinion—That fuch Right is taken away by the Statute of 8th *Ann*; and that an Author, by the faid Statute, is precluded from every Remedy except on the Foundation of the faid Statute and on the Terms and Conditions prefcribed thereby.—And gave his Reafons.
4. Upon the fourth Queftion, delivered his Opinion—That the Author of any Literary Composition and his Affigns had not the fole Right of Printing and Publishing the fame, in perpetuity, by the Common Law.—And gave his Reafons.
5. Upon the fifth Queftion, delivered his Opinion—That the Right is impeached reftained and taken away by the Statute of 8th *Ann*.—And gave his Reafons.

Mr. Juftice
Gould.

Then Mr. Juftice GOULD was heard upon the faid Queftions.
—And

1. Upon the firft Queftion, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the fole Right of firft Printing and Publishing the fame for Sale; and might bring an Action againft any Perfon who printed published and fold the fame without his Confent.—And gave his Reafons.
2. Upon the fecond Queftion, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing fuch Book or Literary Composition; and that no Perfon might afterward reprint and fell, for his own Benefit, fuch Book or Literary Composition, againft the Will of the Author.—And gave his Reafons.
3. Upon the third Queftion, delivered his Opinion—That fuch Action at Common Law is taken away by the Statute of 8th *Ann*; and that an Author, by the faid Statute, is precluded from every Remedy except on the Foundation of the faid Statute and on the Terms and Conditions prefcribed thereby.—And gave his Reafons.
4. Upon the fourth Queftion, delivered his Opinion—That the Author of any Literary Composition and his Affigns had the fole Right of Printing and Publishing the fame, in perpetuity, by the Common Law.—And gave his Reafons.
5. Upon

5. Upon the fifth Question, delivered his Opinion—That this Right is impeached restrained and taken away by the Statute of 8th *Ann.*—And gave his Reasons.

Then Mr. Baron ADAMS was heard upon the said Questions. Mr. Baron
Adams.
—And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same; but could not bring an Action against any Person who printed published and sold the same, unless such Person obtained the Copy by Fraud or Violence.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that any Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Right is taken away by the Statute of 8th *Ann.*; and that an Author, by the said Statute, is precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had not the sole Right of Printing and Publishing the same, in perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That the Right is impeached restrained and taken away by the Statute of 8th *Ann.*—And gave his Reasons.

ORDERED, That the further Consideration of the said Cause be Adjourned to *Monday* next; and that the Judges do then attend, to deliver their Opinions *seriatim*, with their Reasons, upon said Questions.

Die Lunæ, 21 Februarii 1774.

Lord Chief
Baron.

The Lord Chief Baron of the Court of Exchequer was heard upon the said Questions.—And

1. Upon the first Question, delivered his Opinion—That at Common Law, an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.
2. Upon the second Question, delivered his Opinion—That the Law did not take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that no Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is not taken away by the Statute of 8th *Ann*; and that an Author, by the said Statute, is not precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had the sole Right of Printing and Publishing the same, in perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is not any way impeached restrained and taken away by the Statute of 8th *Ann*.—And gave his Reasons.

Lord Chief
Justice.

Then the Lord Chief Justice of the Court of Common Pleas was heard upon the said Questions.—And

1. Upon the first Question, delivered his Opinion—That at Common Law an Author of any Book or Literary Composition had the sole Right of first Printing and Publishing the same for Sale; and might bring an Action against any Person who printed published and sold the same without his Consent.—And gave his Reasons.

2. Upon the second Question, delivered his Opinion—That the Law did take away his Right, upon his Printing and Publishing such Book or Literary Composition; and that any Person might afterward reprint and sell, for his own Benefit, such Book or Literary Composition, against the Will of the Author.—And gave his Reasons.
3. Upon the third Question, delivered his Opinion—That such Action at Common Law is taken away by the Statute of 8th *Ann*; and that an Author by the said Statute is precluded from every Remedy except on the Foundation of the said Statute and on the Terms and Conditions prescribed thereby.—And gave his Reasons.
4. Upon the fourth Question, delivered his Opinion—That the Author of any Literary Composition and his Assigns had not the sole Right of Printing and Publishing the same, in perpetuity, by the Common Law.—And gave his Reasons.
5. Upon the fifth Question, delivered his Opinion—That this Right is impeached restrained and taken away by the Statute of 8th *Ann*.—And gave his Reasons.

SO that, of the Eleven Judges, there were Eight to Three, upon the first Question; Seven to Four, upon the Second; and Five to Six, upon the Third.

It was notorious, that Lord MANSFIELD adhered to his Opinion; and therefore concurred with the Eight, upon the first Question; with the Seven, upon the Second; and with the Five, upon the Third. But it being very unusual, (from Reasons of Delicacy,) for a PEER to support his own Judgment, upon an Appeal to the House of Lords, he did not speak.

And the Lord Chancellor seconding Lord CAMDEN's Motion “to reverse;” The Decree was REVERSED.

The Argument upon the third Question turned greatly upon the Meaning of the Proviso in the 8th of Queen *Ann*, which saves the Rights of the Universities. It is the 9th Clause, and runs in these Words—“PROVIDED that nothing in this Act
“contained shall extend or be construed to extend, *either to pre-*
“*judice or confirm any Right* that the said Universities or any of
“them, or any Person or Persons, have or claim to have, to the
“printing or reprinting any Book or Copy already printed, or
“hereafter to printed.”

THE

* 15 G. 3.
c. 53. THE UNIVERSITIES, alarmed at the Consequences of this Determination, applied for and obtained an * Act of Parliament establishing, in perpetuity, their Right to all the Copies given them heretofore, or which might hereafter be given to or acquired by them.

MEMORANDUM—

In a former Account of this Case, which (at the Request of several of my most learned and respectable Friends) I communicated to the Public, some Time ago, in a detached Piece, I inserted a marginal Note upon Lord *Mansfield's* mentioning “ that *Printing was introduced* in the Reign of *Edw. 4th. or Hen. 6.*” which marginal Note was not only unnecessary and improper, but grossly erroneous and false in Fact. I have never been able to recollect or discover what led me into such an egregious Blunder. The only Method that occurs to me of making Compensation for it, is to endeavour to fix with some Degree of Accuracy and Precision, by this present Note, the real and true Times and Person, when and by whom the Art of Printing was originally *discovered*; and when and how it was afterwards first introduced into *this* Country.

Very great Honour is certainly due to the ingenious *Inventors* of this most noble and useful Art: And even the Cities where it was first attempted to be put in Practice claim some Share of Reputation, from having given Birth or Residence to the first Discoverors.

HAERLEM, MENTZ and STRASBURGH seem to have the best Pretensions of this Sort, with regard to the *Original Invention*. VENICE has a better Claim to the *Improvement*, than to the first Rudiments. For, *Nicolas Jenson*, who is generally supposed to have first taught the Art of Printing to the *Venetians*, did not begin Printing there till the Year 1470: And if *John de Spira's* Claim should be allowed, who says “ that HE was the *first* who “ had ever printed in that City,” yet his Pretensions go only a Year or Two further backward. And even admitting that another Book was printed at *Venice* before *John de Spira's* “ *Cicerone's Epistles ad Familiares*,” in 1469; (namely, “ *Fr. Marantii de Componendis Versibus Hexametro et Pentametro*, by “ *Ranolt, Venet. 1468* ;”) yet that would carry it back but One Year more, in Support of the *Venetian* Claim. Whereas the first Rudiments of the Art, the first rough Specimens, the first Essay with *separate wooden* Types, if not elsewhere, yet, at least at *Haerlem*, was about Thirty Years anterior to those Dates. There is indeed some Difficulty in ascertaining the Claim to the first Invention of Arts which though entirely owing to the Sagacity of

of the Inventor, are scarce perfect and complete whilst in Embryo, and kept secret; but when once discovered to the World, soon receive Improvement from other ingenious Men to whom the Original Idea of the Invention never did or ever would have presented itself. So, in the Art of Printing, *Haerlem* and *Mentz* both claim the Honour of being the Place where it was first known and practised. Dr. *Middleton* goes so far as to say, "that it is certain, beyond all Doubt, that Printing was first invented and propagated from *Mentz*." Others ascribe it to *Haerlem*. And it is true of Each, in a qualified Sense; if Printing on fusile separate Types be considered as the Invention of Printing. In this Sense, the Improvement is the Title to the Merit of the Invention: But the original Thought and first Attempt belongs to another Person, and probably would never have occurred to the Improver. At *Haerlem*, it was first thought of, by *Laurentius*, about 1430; and practised by him there, with separate wooden Types: It was afterwards practised at *Mentz*, with metal Types, first cut, and then cast; invented there, by one of the two Brothers of the Name of *Geinsfleisch*; probably by the elder *John Geinsfleisch*, about the Year 1442, when he published his first Essays on wooden Types, which had not answered his Expectations. However, both the Brothers have been called *Protopharagmatici*: This Invention of printing with metal Types was called "*Ars characterizandi*." The cut metal Types were further improved by *John Fust*, of *Mentz*; who, in 1452, completed the Art, by the Help of his Servant *Peter Schoeffer*, whom he adopted for his Son, and to whom he gave his Daughter in Marriage, *pro dignâ laborum multarumque adinventionum remuneratione*. So that the original Foundation of the Art of Printing, in general, seems to have been laid at *Haerlem*; and the Improvements made at *Mentz*. As to *Straßburgh*, it can have no Pretensions nearly equal to either *Haerlem* or *Mentz*. *Gutenberg* endeavoured to attain the Art whilst he resided in that City: And his first Attempts were made in 1436, with wooden Types. But he and his Partners were never able to bring the Art to Perfection. He quitted *Straßburgh* in 1444 or 1445; greatly involved in Debt, and obliged to sell all that he had.

THE TRUE ORIGINAL INVENTOR of Printing seems to have been *LAURENTIUS* of *Haerlem*, Son of *John*, who was Son of another *Laurence*. This *Laurence*, the Grandson, was born at *Haerlem* about 1370; and died in 1440. He was *Edituus* or *Custos* of the Cathedral of *Haerlem*; and was called *Coster*, from his Office, not from his Family-Name: His Descent is said to have been from an illegitimate Branch of the *Gens Brederodia*. He was a Man of large Property: And his Office was both respectable and lucrative. *Hadrian Junius* gives a full Narrative of the Accident which led *Laurentius* into the happy Train of this useful Invention: (See his

Batavia, Ed. Ludg. Bat. 1588. p. 253.) This *Laurentius* being a Man of Ingenuity and Judgment, he proceeded Step by Step, by inventing a more glutinous Ink, and then forming whole Pages of Wood with Letters cut upon them; pasting the Backsides of the Pages together, lest they should betray their Nakedness. Then he changed his original beechen Letters, for leaden Ones; and those again for a Mixture of Tin and Lead, as a less flexible and more solid and durable Substance. His first Works, in one of which (the "*Speculum Salutis*") he introduced Pictures on wooden Blocks, were printed on *separate moveable wooden Types*, fastened together by Threads. He did not live to see the Art brought to Perfection. He died in 1440, aged 70; and was succeeded, either by his Son in Law *Thomas Peter*, who married his only Daughter *Lucia*; or by their immediate Descendants *Peter, Andrew, and Thomas*; who seem to have been industrious, and printed neatly, with separate wooden Types. Their last known Work was printed at *Haerlem* in 1472: Soon after which, they disposed of all their Materials, and probably quitted their Employment. *Laurentius's* Types were stolen, soon after his Death. The Thief was one of his Workmen; and his Name was *John*; and there is little Doubt of his being a Native of *Mentz*; to which Place he conveyed them, and settled there: But it is not so certain, what was his Surname. *John Fust* or *Faust* has been suspected: But it seems to be an unjust Charge upon him. So also, upon *John Gutenberg*; whose Residence was at *Strasburgh*, from 1436 to 1444, endeavouring with fruitless Labour and Expence to attain the Art. Neither does it seem just to suspect *John Meidenbachius*, an Assistant to the first *Mentz*-Printers; nor *John Petersheimius*, sometime a Servant to *Fust* and *Schoeffer*, and who set up a Printing-House at *Frankfort* in 1459. It is most probable, (all Things being fully considered,) that this dishonest and unfaithful Servant was JOHN GEINSFLEICH Senior, Elder Brother of *Gutenberg*; who was born at *Mentz*, but had resided in other Places. As he stole the Types from *Haerlem* with a View to set up for himself elsewhere, it was natural for him to make Choice of *Mentz*, his Native City.—Accordingly, he took the shortest Route, through *Amsterdam* and *Cologne*, to *Mentz*; where he fixed his Residence, in the Year 1441, and in 1442 published two small Works. It is said, in a *Lambeth Record* which will be hereafter taken Notice of, p. 3. "that *Mentz* "gained the Art, by the Brother of one of the Workmen of " *Haerlem*, who learnt it at Home of his Brother, who afterwards set up for himself at *Mentz*." But *Gutenberg*, the younger Brother, never was a Servant to *Laurentius*. It was the elder Brother, who having learnt the Art by being Servant to the first Inventor, stole his Types, and carried them to *Mentz* his Native Country: And it must be this elder Brother who instructed his younger Brother *Gutenberg* in the Art; which younger Brother

ther first applied himself to the Business at *Straßburgh*, and not succeeding there (as has been before mentioned) quitted *Straßburgh*, and joined his Elder Brother who had in the mean Time settled at *Mentz*.

As to the Imagination of *Specklinus* and the other Chronologer of *Straßburgh*, "that *Straßburgh* was the *Place* of the Invention, "and *Mentelius* the *Person* who was the Inventor, and from "whom the Types were stolen," it is quite erroneous. *Mentelius* certainly did not begin to print till 1444; probably, not before 1447. *Gutenberg* was an earlier Printer than *Mentelius*: Much more so were *Laurentius*, at *Haerlem*; and *John Geinsfleisch* Senior, at *Mentz*. *Ulric Zell*, in his *Chronicon Coloniae*, 1499, attributes the Invention, or at least the Completion of the Art, to *Gutenberg* at *Mentz*; though he admits that some Books had been published in *Holland* earlier than in that City: and from *Mentz*, he says, it was first communicated to *Cologne*; next, to *Straßburgh*; then, to *Venice*. There is no certain Proof of any Book having been printed at *Straßburgh*, till after 1462: After which Period, Printing made a rapid Progress in *Europe*. In 1490, it reached *Constantinople*; in the Middle of the next Century, it advanced into *Africa* and *America*; and about 1560, was introduced into *Russia*. After this, it was even carried into *Iceland*, the farthest North (as Mr. *Bryant* observes) of any Place where Arts and Sciences have ever resided. This very learned and ingenious Gentleman has in his own Possession a Book written in *Latin* by *Arngrim Jonas*, in his own Country of *Iceland*, and printed "*Typis Hollensibus in Islandia Boreali, Anno 1612.*" This curious little Treatise is intitled "*Anatome Blefkiniana.*" Mr. *Bryant* notes "that *Hola* is, in some Maps, placed within the "Arctic Circle; and certainly is not far removed from it."

THIS may suffice, I should hope, to satisfy the Curiosity of the Reader, with respect to the *Original Invention* of Printing, and its earliest Advances in *foreign* Countries.

IT is now Time to examine how, when, and by whom, it was first introduced into *our own*.

Concerning this Matter, there are different Accounts.

It was formerly the general Opinion and Belief, and seemed to be agreed by all our Historians, that the Art of Printing was introduced and first practised in *England* by Mr. *William Caxton*, a Citizen of *London*, who had been bred a Mercer, having served an Apprenticeship to *Robert Large* in that Branch of Business: Which *Robert Large* died in 1441, after having been Sheriff and Lord Mayor of *London*; and left a Legacy to *Caxton*, in Testi-

mony of his good Character and Integrity. From the Time of his Master's Death, Mr. *Caxton* spent the following Thirty Years (from 1441 to 1471) beyond Sea, in the Business of Merchandize. In 1464, he was employed by King *Edward* the Fourth in a public and honourable Negotiation, to transact and conclude a Treaty of Commerce between that King and his Brother-in-Law the Duke of *Burgundy*.—By his long Residence in *Holland*, *Flanders*, and *Germany*, he had Opportunity of being informed of the whole Method and Process of this Art: And returning to *England*, and meeting with Encouragement from great Persons, and particularly from the then Abbot of *Westminster*, he first set up a Press in that Abbey, (in the *Almonry* or *Ambry*,) and began to print Books soon after the Year 1471, and is said to have pursued his Business there with extraordinary Diligence till the Year 1494; in which Year Dr. *Middleton* says he died; “not in the Year following, as all who write of him affirm.” But Mr. *Ames* says, if not proves, that it was no longer than the Year 1491. He was probably upwards of Four-score Years of Age, when he died. The “*Recuyel of the Historyes of Troye*,” is supposed to have been the first Book that he printed in *England*. Dr. *Middleton* is a very strenuous Advocate for *Caxton*; and professes a Desire “to do Justice to his Memory, and not suffer him to be robbed of the Glory so clearly due to him, of having first imported into this Kingdom an Art of great Use and Benefit to Mankind; a Kind of Merit that, in the Sense of all Nations, gives the best Title to true Praise, and the best Claim to be commemorated with Honour to Posterity.” The Doctor states the positive Evidence in Proof of his Assertion, as well as the Negative and Circumstantial: And he observes “that all our Writers before the Restoration, who mention the Introduction of the Art amongst us, give *Caxton* the Credit of it, without any Contradiction or Variation.” He cites *Stowe*, *Trussell*, *Sir Richard Baker*, *Leland*, and *Howell*, and the more modern Authorities of Mr. *Henry Wharton* and *M. Du Pin*; all strong in Favour of his Opinion.

In Opposition, however, to all these great and seemingly invincible Testimonies and Authorities on behalf of Mr. *Caxton*, a Book which had been scarce observed before the Restoration, was soon after that Time taken Notice of, and looked upon as a strong Argument, if not a full and clear Proof, “that the Art of Printing had been exercised in the University of *Oxford*, before *Caxton* exercised it at *Westminster*, in 1471.” This Book bears for its Title, “*Expositio Sancti Jeronimi in Symbolum Apostolorum ad Papam Laurentium*,” and at the End—“*Explicit Expositio, &c. Impressa Oxonie, & finita Anno Domini M.CCCC.LXVIII. xvii die Decembris*.” Yet History was quite silent about this very remarkable Fact of a Printing in
England

England prior to *Caxton's*; nor was there any Memorial to be found in the University, of a Circumstance so honourable to them, and so beneficial to Literature. It has been urged, that notwithstanding this long Silence concerning such a very extraordinary Event, the Matter is now cleared up, by the Discovery of a Record which had long lain obscure and unknown at *Lambeth-Palace*, in the Register of the See of *Canterbury*; which Record contains a *Narrative* of the whole Transaction, drawn up at the very Time. An Account of this Record was first published by *Richard Atkyns*, Esq. in the Beginning of 1664, in his "Original and Growth of Printing, collected out of History and the Records of this Kingdom." It sets forth, "that *Thomas Bouchier*, Archbishop of *Canterbury*, moved King *Henry the Sixth* to use all possible Means for procuring a Printing-Mould to be brought into this Kingdom. The King readily hearkened to the Motion; and, taking private Advice how to effect his Design, concluded that it could not be brought about without great Secresy and a considerable Sum of Money given to such Person or Persons as would draw off some of the Workmen of *Harleim* in *Holland*, where *John Cuttenberg* had newly invented it, and was himself personally at Work. It is resolved, that less than One Thousand Marks would not produce the desired Effect: Towards which Sum, the said Archbishop presented the King Three Hundred Marks. The Management of the Design was committed to Mr. *Robert Turnour*, of the Robes to the King, and much in Favour with him. Mr. *Turnour* took to his Assistance Mr. *Caxton*, a Citizen of good Abilities; who, trading much into *Holland*, might be a credible Pretence as well for his Going, as Stay in the *Low Countries*. Mr. *Turnour* was in Disguise, (his Beard and Hair shaven quite off:) but Mr. *Caxton* appeared known and public.—They went first to *Amsterdam*, then to *Leyden*, not daring to enter *Harleim* itself: For, the Town was very jealous, and had apprehended and imprisoned divers Persons who had come from other Parts for the same Purpose. They stayed till they had spent the whole Thousand Marks, in Gifts and Expences: So as the King was fain to send Five Hundred Marks more. Mr. *Turnour* had written to the King, that he had almost done his Work; a Bargain being struck betwixt him and two *Hollanders*, for bringing off one of the Under-Workmen, whose Name was *FREDERICK CORSELLS* (or rather *CORSELLIS*;) who, late one Night, stole from his Fellows, in Disguise, into a Vessel prepared for that Purpose, and got safe to *London*. It was not thought prudent, to set him on Work at *London*: But by the Archbishop's Means, (who had been first Vice-Chancellor and afterwards Chancellor of the University of *Oxon*;) *Corsellis* was carried with a Guard to *Oxon*; which Guard constantly watched this *Corsellis*, to prevent

“ vent him from any possible Escape, till he had made good his
 “ Promise in *teaching them how to print*. So that at OXFORD
 “ Printing was *first set up in England*: Which was before there
 “ was any Printing-Prefs or Printer in *France, Spain, Italy, or*
 “ *Germany* except the City of *Mentz*, which claims Seniority as
 “ to Printing, even of *Harleim* itself; calling her City *Urbem*
 “ *Moguntinam artis typographicæ inventricem primam*; though it
 “ is known to be otherwise, that City gaining that Art by the
 “ Brother of one of the Workmen of *Harleim*, who had learnt
 “ it at Home of his Brother, and after set up for himself at
 “ *Mentz*. This Prefs at *Oxford* was afterwards found inconve-
 “ nient to be the sole Printing-Place of *England*; as being too
 “ far from *London* and the Sea: Wherefore the King set up a
 “ Prefs at *St. Alban's*, and another in the City of *Westminster*,
 “ where they printed several Books of Divinity and Physic. For,
 “ the King (for Reasons best known to himself and Council)
 “ permitted then *no Law-Books* to be printed; nor did any
 “ Printer exercise that Art, but only such as were the King's
 “ sworn Servants; the King himself having the Price and Emo-
 “ lument for printing Books.”

UPON the Authority of this Record, all our later Writers have declared CORSELLIS to have been the *first* Printer in *England*. This is admitted by Dr. *Middleton*: And he specifies *Antony Wood* and Mr. *Mattaire*, and *Palmer*, and *Bagford*, by Name, as Persons who were clear in that Opinion. But he says, “ it is “ strange that a Piece so fabulous and carrying such evident “ Marks of *Forgery*, could impose upon Men so knowing and “ inquisitive.” He asserts, “ that as it was never heard of be- “ fore the Publication of *Atkyns's* Book, so it has never since “ been seen or produced by any Man.” He cites *Palmer* himself as owning “ that it is not to be found there *now*.” And he thinks it clear, that Archbishop *Parker* must have very carefully examined the Registers of *Canterbury*, and that it was not there in *his* Time. In fine, he declares in express Terms, “ That we “ may pronounce this Record to be a FORGERY.”

But though he seems to exult in having cleared his Hands of this *Record*, yet he admits “ that the Book itself stands firm as “ a Monument of the Exercise of Printing in *Oxford* Six Years “ older than any Book of *Caxton* with *Date*.*” He acknowledges the Fact to be strong, and “ what in *ordinary* Cases passes for “ certain Evidence of the Age of Books:” But he says, “ that “ in *this*, there are such contrary Facts to balance it, and such “ Circumstances to turn the Scale, that he takes the Date in “ Question to have been falsified originally by the Printer, either “ by Design or Mistake, and an X to have been dropt or omit- “ ted in the Age of its Impression.” And he argues with his usual

* The first Work that is known to have a Date to it, was the PSALTER published at Mentz in 1457.

usual Sagacity and Acuteness, to shew not only the Possibility of his Conjecture, but the Probability of it, and (as he says) “to make it even certain.”

Mr. *Bowyer*, whose general Learning and particular Knowledge in his Profession seem to qualify him for being at least as good a Judge of this Dispute as any Man that ever lived, does by no means agree with Dr. *Middleton* in this Point of *Caxton's* Priority to the *Oxford-Book*, or in the Arguments adduced by the Doctor in Support of his Opinion; any more than he does in the former Point, of the Place where the Art was first invented and practised Abroad.—He is of Opinion, that the *Oxford-Press* was prior to *Caxton's*; and thinks that those who have called Mr. *Caxton* the “first Printer in *England*,” and *Leland* in particular, meant that he was the first who “practised the Art with *fusile* “Types, and consequently first brought it to *Perfection*.” Which is not inconsistent with *Corfellis's* having printed earlier at *Oxford* with *separate cut Types in Wood*, which was the only Method he had learnt at *Harleim*. The speaking of Mr. *Caxton* as the first Printer in *England*, in *this* Sense of the Expression, is not irreconcilable with the Story of *Corfellis*.

THESE Facts and Opinions being thus laid before the Reader, he will judge for himself, concerning their Truth or Probability. The Disputants on both Sides have agreed in one Position, which will be easily assented to; namely, “that it is very unsafe to trust “to Common History; and necessary to recur to Original Testimonies, if we would know the State of Facts with Exactness.”

Canning *versus* Davis.

Thursday
27th April
1769.

MR. *Dunning* (Solicitor-General) shewed Cause against a Rule which had been applied for by Mr. *Ashurst*, “to set aside the Proceedings for a *Variance* between the Declaration and the Process.” The Process was “to answer the Plaintiff *qui tam pro Domino Rege* quam pro se ipso sequitur:” The Declaration was in his own name, only; omitting the *qui tam* Part.

THE COURT held the Variance to be fatal.

PROCEEDINGS SET ASIDE.

Note—Master *Benton* thought, and the Court seemed to agree, that the *Converse* would have been otherwise; namely, that if the *Process* had been “to answer the Plaintiff, *singly*,” he might, in *that* Case, have declared *tam pro se ipso, quam pro Domino Rege*.

Brand and Wife *versus* Roberts and Wife.

THE COURT made absolute a Rule for a *Prohibition* to the Spiritual Court, to stay their Proceedings against the Defendants below, for calling a Woman “Whore,” in *London*; where, by the Custom, the Words are actionable. They said, this Matter had been long settled. (Lord *Mansfield* was not in Court.)

Vide ante, 2032. *Theyer v. Eastwick*: Also see 1 *Sir John Strange*, p. 187. *Argyle v. Hunt*, and p. 471. *Vicars v. Worth*, and p. 545. *Hodgkins et Ux. v. Corbet et Ux.* and p. 555. *Cook v. Wingfield*.

Friday 28th
April 1769.

Pryce, Bart. *versus* Foulkes and Others.

THIS was an Action of *Trespass* brought against seven Defendants. There were two Writs of *Latitat*. Four of the Defendants were named in One of them; and Three, in the other: (For, there can't be more than Four Defendants included in the same *Latitat*.) The Plaintiff not declaring within the limited Time, the Seven Defendants signed Seven distinct Judgments of *Non-pros* against him.

The Plaintiff objected to this Proceeding, as being irregular; For that there ought to have been *but One Judgment* against him, for all the Defendants jointly; *not a several Judgment* for each Defendant.

THE COURT were of this Opinion; and accordingly set them aside, as irregular.

See 2 *Salk*. 455. Title “*Nonsuit*,” pl. 1. *Allington v. Vavafor*: Where a *Latitat* having been sued out against Four Defendants in *Trespass*, the Plaintiff was *Nonsuit* for Want of a Declaration; and the Defendant's Attorney entered Four *Nonsuits* against him. It was holden to be irregular; because the *Trespass* is joint; and though the Plaintiff may count severally against the Defendants, yet it remains joint till it is severed by the Court.

Captain Parker *versus* Lord Clive.Wednesday
26th April
1769.

THIS was an Action brought by an Officer in the Military Service of the *East India* Company, against the Defendant who was Commander in Chief of their Forces in *India*, for an Assault and false Imprisonment.

The Transaction arose in the *East Indies*, upon a Dispute about a Perquisite called *Batta*, which had been received by former Military Officers there; but was thought proper, by Lord *Clive*, to be discontinued in future, or at least considerably lessened. The Officers were exceedingly dissatisfied with this Reduction of their Pay or Perquisite, which had been allowed to their Predecessors; and resented it so highly, that about 175 of them threw up their Commissions and quitted the Service: Of which Number Captain *Parker* was One. Whereupon Lord *Clive*, as Commander in Chief, imprisoned him; and he was kept Four Months in Custody: But a Court Martial being called upon the Occasion, he was tried by it, and acquitted; as they apprehended him to have a Right to resign his Commission and quit the Service.

Lord MANSFIELD, before whom the Cause was tried, held that these Military Officers in the Service of the *East India* Company were *not* at Liberty to resign their Commissions and quit the Service, at *any* Time and under *any* Circumstances, merely *ad libitum*, whenever they themselves should think fit or be so inclined. If that were the Case, then indeed it would follow, that after Resigning their Commission, and thereby ceasing to be Objects of Military Jurisdiction, Lord *Clive* could no longer have any Power over them. This is the true Question, in the present Case: It turns singly upon the Plaintiff's having or not having this Option to resign; that is, "Whether such an Officer can quit the Service whenever he pleases, at *any* Time and under *any* Circumstances whatever." His Lordship thought he could *not*. But, in order to take the Opinion of the whole Court upon the Point of Law, he directed that the Plaintiff should be *non-suited*, but with Liberty to move the Court to set aside the *Non-suit*, *without* Payment of Costs.

Such Motion was accordingly made: And the Point was argued on *Saturday* the 22d and *Monday* the 24th of *April* 1769, by Mr. *Dunning*, then Solicitor-General, and Mr. *Cox*, for the Plaintiff; and Mr. *Thurlow*, Mr. *Wallace*, and Mr. *Sayer*, for the Defendant.

On

On the Part of the Plaintiff, it was insisted that the Company's Contract with their Military Officers is *reciprocal*; and *either* Side is at Liberty to put an End to it whenever they please. The Rank and File Men engage, indeed, for a stipulated Term: But the Contract with their Officers does not mention or hint at any Time or Duration of their Service. It is a *general* Appointment: No binding Engagement is expressed, on either Side. The Company's Power to appoint Officers is founded on a Charter of *W. 3.** The Plaintiff had a Commission from the Company, in 1764, appointing him a Captain of Foot; and another like to it, given him by the Governor and Council of *Bengal*. There never was an Obligation upon any Man to continue a Soldier beyond the Time of his Contract. The Statute of 18 *H. 6. c. 19.* for punishing Deserters as Felons, is confined to their departing without Licence *within the Term* for which they were retained, Our annual Mutiny-Acts bind only during their Continuance. If they should expire, Soldiers would not be obliged to continue in the Service longer than they are contracted for: And it would be hard, if the *East India* Company's Officers should be bound to continue in their Service to the End of their Lives, when the Company lessen or take away from them the very Consideration that induced them to enter into it. As the Company can discharge them *ad libitum* and arbitrarily, they ought to have a reciprocal Election of quitting. Here were no Circumstances that could render the Resignation improper or dishonourable: The Pay was withdrawn, or at least the usual Emoluments. It was not a Resignation within the Limits of a Term contracted for. He had a Right to quit: He did quit. He was not a Soldier of the Company, nor in their Pay, at the Time when he was treated as such. Therefore this Nonsuit ought to be set aside, and a new Trial had.

* And vide
27 G. 2. c. 9.

On the Part of the Defendant, it was urged That the Subject-Matter of this Contract proves the Plaintiff's Claim to be absolutely inconsistent with the Nature of the Contract. It is absurd to imagine that the Officers should be all at Liberty to quit at the very Moment when their Service is most required; upon the very Point of an Engagement, the Instant of an Attack, or *flagrante bello*. The Company have full Power of making War and Peace: And therefore it must be meant and intended that they should have the same Power over their Officers and Soldiers in *India*, as the King himself has here at Home, or any other acknowledged Sovereign. If a Man, since the Statute of 18 *H. 6.* lists indefinitely "to serve the King in his Wars," he is bound till discharged. If a Soldier is hired by the *East India* Company in general Terms, "to serve them in their Wars," he must at least be bound till the War is at an End: He can't quit *flagrante bello*. Indeed, if they choose to hire for a limited Time, the

Persons so specifically engaging for a limited Time *only* will not be obliged to serve beyond it. Though our Mutiny-Acts *annually renewed* are confined within the Limits of a Year, that is not the Case of the Statute which impowers the *India* Company to raise Soldiers:* For, that Act is *perpetual*; and the Officer or * 27 G. 2. Soldier hired under it, by the Company, is liable to Martial c. 9. Law in *India*, till he is discharged. Their Army is a Standing Army: And therefore it was necessary that their Mutiny-Act should be perpetual. It can never be conceived that their Officers should have it in their Power to quit the Service at the very critical Moment when their Assistance is most wanted, and those Duties required of them which were the only Reason of their being taken into it. The Company are at a great Expence upon these Gentlemen, before they can receive any Benefit from their Service: And it would be strange if they might quit the Service, the first Day or Hour that they should become capable of actually entering upon it. The Company might be ruined, if this Doctrine would hold.

IN REPLY, Mr. *Dunning* acknowledged that there appeared to be Inconveniences on both Sides: But it was in the Power of the Company to avoid them, by varying the Terms of their Contract, and engaging the Officers to serve them for a limited Time. If the present Contract, which is indefinite, be not determinable at Will, it must be a Contract *for Life*, if the Company refuse to dissolve it. The Officers ought to have an Option to dissolve it, as well as the Company: It is just, that it should be reciprocal. An Officer's having received a general Commission from the Company, without engaging for any limited Term, can not subject him to the *Indian* Mutiny-Bill and to Martial Law in *India*, during his whole Life. The Act of 27 G. 2. c. 9. is expressly confined to the Time contracted for: The Words are "*within such Time as such Officer or Soldier shall have contracted and agreed to serve the said United Company.*"

THE COURT took Two or Three Days to consider.

And on *Wednesday* 26th *April* 1769,

LORD MANSFIELD declared their Opinion, in these Words—UPON the general abstract Question, WE are ALL of Opinion "that a Military Officer in the Service of the *East India* Company has *not* a Right to resign his Commission, at all Times and under any Circumstances whatsoever, *whenever he pleases.*"

Whereupon, Mr. DUNNING prayed a *new Trial*, in Order to have an Opportunity of shewing the *particular Circumstances* under which Captain *Parker* stood, when he resigned his Commission. For, it was agreed that no Evidence of these particular Circumstances was entered into at the Trial: But the Matter was taken up *in limine*, and the Point reserved upon the *general Question*. Therefore, as there *may* be Circumstances under which such Officer may have a *Right to resign*; though under *other* Circumstances, he may *not* have a Right to do so; it was reasonable that he should have an Opportunity of shewing the true Circumstances which induced this Resignation.

THE COURT judged this to be reasonable; and accordingly granted the Plaintiff a new Trial, without Payment of Costs.

A new Trial was afterwards had: Which went *against* Captain *Parker*.

See further on, in page , under *Tuesday 21st November 1769*, a like Case between Lieutenant *Vertue* and Lord *Clive*; which turned upon the particular Circumstances; and in which Mr. *Vertue* was likewise unsuccessful.

Saturday 6th
May 1769.

Hargrave *versus* Le Breton, One &c.

THIS ACTION was called by the Counsel for the Defendant, an Action of *Slander of the Plaintiff's Title*: But the Plaintiff's Counsel said it was an Action upon the Case, for a *real Injury* sustained by him.

It had been tried before Lord *Mansfield* at *Guildhall*; and a Verdict given for the Plaintiff, with 50*l.* Damages: But the Defendant had moved to set it aside, and to have a new Trial. It was argued upon *Tuesday 25th April 1769*; and again, upon *Saturday* the 29th: And this Day, Lord *Mansfield* delivered the Opinion of the Court.

The general Substance of the Case was, That the Premises, (which were of the Value of about 1200*l.* and originally belonged to one *John Loveday*, but had been mortgaged by him to the Plaintiff *Hargrave*, who had also got in a prior Assignment of them,) were upon *Sale by Auction*, for the Benefit of the Parties respectively interested, and by their joint Agreement. The Auction was actually begun; and some Persons had bid:
But

But at the first Beginning of the Bidding, and before it had proceeded to any considerable Degree of Advancement, the Defendant Mr. *Le Breton*, who was concerned as Attorney for one Mr. *Lee*, a Creditor of *John Loveday* the Original Owner and Mortgagor, came into the Room in a great Hurry; and said to the Company "that he had bad News to tell them." Being asked "What News?" He answered, that he was sent by a Creditor of Mr. *John Loveday's*, to acquaint them "that the said *John Loveday* was a *Bankrupt* before he made the Mortgage to the Plaintiff; and that there was a *Docket* made out, for a Commission against him; and that his Name would be in the *Gazette* on the *Saturday* Evening following." Whereupon, the *Bidding* immediately ceased; and the Estate remained *unfold*, and does still remain so. What the Defendant thus declared, was partly true, and partly otherwise. It was true, "that he was really sent by his Client Mr. *Lee*, who was a Creditor of *Loveday*, on Purpose to make this public Declaration at the Auction, of *Loveday's* being a Bankrupt before he made the Mortgage to the Plaintiff; and that Mr. *Lee* intended to take out a Commission against him." But it was *not true* in Fact, nor did Mr. *Lee*, his Client, give him any Authority to say, "that there was a *Docket* made out for a Commission against him," nor "that his Name would be in the *Gazette* on the *Saturday* Evening following:" Neither is there yet any Docket or Commission, nor has his Name yet been in the *Gazette*. However, *no actual Malice* was either alledged or proved. But the Counsel for the Plaintiff *inferred Malice*, from his false Assertion, which was merely his own, *without any Authority* from his Client; and which (they said) he could not but *know to be false*, as he was himself Mr. *Lee's* Attorney, and the Person to be employed in suing out the Commission of Bankruptcy, if it had been sued out at all. It appeared, upon the Evidence, that One *Bolland* had recommended *Le Breton* to *Lee* (*Loveday's* Creditor) to take out a Commission of Bankruptcy against *Loveday*, who in Fact was then become Bankrupt; and that *Lee* did send *Le Breton* to this Auction, to declare "that he would petition, and make him a Bankrupt that Night." *Le Breton* was not at all known to any of the Parties: Nor had he any Knowledge of these Affairs, other than the Information he received from his Client *Lee*. The Fact of *Loveday's* having committed an Act of Bankruptcy before he made the Mortgage to *Hargrave* was fully proved by *Bolland*: And it appeared that *Lee* had Notice of it from *Bolland*.

THE COUNSEL for the Defendant offered an Objection which did not go to the Merits; and was easily answered. They said, the Action was founded on special Damages: And therefore the Names of those Persons who would otherwise have been Purchasers,

fers, but went off from it upon the speaking of these Words, ought to have been *specified*; whereas this Declaration only charges it thus—"Whereby *divers Persons* who would have purchased &c," *without naming* any One who went off from treating about the Purchase.

The Answer was, That in the Nature of this Transaction it was *impossible* to specify Names. The Injury complained of is, that the Bidding was thereby prevented and stopt. No One can tell *who* would have bid, and who would not. The Auction ceased: And every Body went away. It could not be known who would have been Bidders or Purchasers, if it had not been thus put an End to.

THE MAIN QUESTION was—Whether the Defendant was justifiable in having spoken these Words upon this Occasion, as a Messenger from and Agent for the Creditor of *Loveday*; not having confined himself to the Message he was authorised by his Client to deliver, and the Declaration he was sent to make on his Client's Behalf; but having added to it, of his own Head, other Assertions which were not true in Fact, nor given him in Charge by his Client. For, supposing him to be excuseable in executing his Commission, as Mr. *Lee's* Attorney or Agent, yet he had exceeded the Bounds of it, as well as the strict Truth: Which was urged by the Plaintiff's Counsel, to imply Malice in the Defendant himself personally.

THE COURT seemed, upon the Two first mentioned Days, to have no Doubt but that Mr. *Le Breton*, who acted as Agent for the Creditor would have been excuseable, if he had only delivered his Client's Message; and that if the Creditor had been himself present and had *spoken* the Words of his own Message, he would not have been liable to an Action for giving a Notice necessary to be given, in order to prevent a Purchaser's Title from being good against him for Want of Notice; and that Malice should not be implied, where the Words spoken are true, and the Speaker claims Title. But whether Mr. *Le Breton* was excuseable for what he voluntarily added, *beyond* the Limits of his Commission, they took a few Days to consider.

LORD MANSFIELD now declared the Result of their Consideration.

THE QUESTION is, "Whether, upon the Evidence, the Plaintiff ought to recover against the Defendant, upon the Circumstances of this Case."

It is to be considered, in Point of Law, 1st. "Whether this Action would have lain against *Le Breton*, the Attorney for the Creditor, if he had only delivered the Message in his *Client's own Words*:" And 2dly, "Whether the *Variation* he made from them will subject him to this Action."

As to the first—We are ALL clear "that it would *not*." He is no more liable to the Action, than the Creditor himself would have been. He was sent by *Lee*, to make this Declaration: And *qui facit per Alium, facit per Se*. But the Plaintiff could not have recovered against *Lee*: For, to maintain such an Action as this is, there must be MALICE, either express or implied; and the Words spoken must go to defeat the Plaintiff's Title. Whereas, here is *no Malice*, either express or implied. The Words of the Message sent by *Lee* are *true*: And they proceed from a Person called upon to give Notice; either to protect his own Property, or (what is his Duty as a moral Act,) to save another from being cheated. *Lee* had Notice of *Loveday's* Bankruptcy, from *Bolland*. *Lee* had an *Interest* in the Fund: And he was intitled to take out a Commission against *Loveday*. He reads an Advertisement "for the Sale of *Loveday's* Estate." He was thereby *called upon*, in order to preserve his own Interest and that of the Rest of the Creditors, as an honest and a prudent Man, to *give this Notice*. For, if the Estate had been purchased without Notice of the Bankruptcy, such Purchaser would have been protected by a satisfied Term prior to the Act of Bankruptcy still standing out. When an Auction was advertised and was proceeding for the Sale of this Estate, with Intent to cheat Purchasers by a false Title, shall not he, as an honest Man, give this Notice, and prevent Iniquity?

But here, this Man (*Lee*) had a Property of his own, to secure: He was a Creditor of *Loveday*, and intended to sue out a Commission.

We are clear, that under *such* Circumstances, *Malice* cannot be *implied*.

No Action lies for giving the *true* Character of a Servant, upon Application made to his former Master, to inquire into his Character, with a View of hiring him: Unless there should be extraordinary Circumstances of express Malice.

Another Ground to maintain such an Action as this, is "that it must be *such* a Slander as goes directly to defeat the Plaintiff's Title." But in this Case, the Assertion does not go to defeat the Plaintiff's Title. [Which his Lordship shewed by an

Induction of Particulars, not at all necessary to be here specified; as they relate only to this single Case.]

As to the SECOND QUESTION—"Whether *Le Breton's* varying from the Message he was charged with, and adding more than he was commissioned to declare, or even authorized to say in Point of strict Truth"—It appeared, that his Client had told him "that he *would* take out a Commission that Night." And if he had done what he told *Le Breton* "that he *would* do," *Loveday's* Name *would* have been in the *Gazette* on the Saturday Evening following. So that there was no material Variation from what he was commissioned by his Client *Lee* to say. Nor did it make any Difference with regard to the Plaintiff or his Title: For, *Loveday* was then become Bankrupt and liable to a Commission; which Commission might have been taken out upon that Day, and the Bankrupt's Name inserted in the *Gazette* of the Saturday Evening following.

WE are therefore ALL of Opinion, that there is no Foundation for this Verdict; and that it ought to be set aside upon Payment of Costs.

RULE made ABSOLUTE, for setting aside the Verdict, and having a new Trial, upon Payment of Costs.

Monday 8th
May 1769.

Hall *versus* Harding and Others.

THIS was an Action in *Replevin*, for distraining Fifty-One of the Plaintiff's Sheep, upon a Waste or Pasture called *Whitmanslie Down* in the Parish of *Odibam* in *Hampshire*.

The Defendants avow the Distress; because the Defendant *Harding* was intitled to a Right of Common, in respect of Ten Acres of Land in his Possession, for Two Sheep for every Acre of those Ten; and because the Sheep were doing Damage to that Right, the Defendants distrained them.

The Plaintiff pleaded (by Leave) Four Pleas in Bar; alledging different Rights of Common to himself: Upon Three of which Pleas there are Issues joined. In the Fourth of them, the Plaintiff derives a Right of Common to himself as Tenant of Eight Acres of Land in that Parish, with the like Limitation, that is, for Two Sheep for every Acre: And being possessed of those Eight Acres, he put Sixteen Sheep into the Common; and in that Right they continued therein, till the Defendants wrongfully distrained them.

To this Plea in Bar of the Avowry, the Defendants (the Avowants) after admitting the Plaintiff's Right of Common as pleaded by him, reply that at the Time of the Distress, the Plaintiff had Sixteen Sheep upon the Common, *over above and besides* the Sixteen which the Defendants distrained: And that the Defendants left the first mentioned Sixteen to use the Common; and only distrained the *supernumerary* Sixteen with which the Plaintiff had *overcharged* it of his own Wrong, and which were doing Damage to *Harding* in Manner and Form as alleged in the Avowry: (Which Allegation in the Avowry concluded—"So that *Harding* could not enjoy his Common in so "large and ample a Manner as he ought.")

To this Replication the Plaintiff demurred.

This Demurrer was argued on *Friday 28th April 1769*, by Serjeant *Burland* for the Plaintiff, and Serjeant *Davy* for the Defendants.

THE QUESTION was "Whether One *Commoner* can DISTRAIN another *Commoner's* Cattle, with which he has overcharged the Common beyond his *stinted* Number."

Serjeant *Burland* argued that he could *not*. He has a Right to distrain the Cattle of a STRANGER Damage-feasant: But he has not a Right to distrain the Cattle of *another Commoner* surcharging.

Bracton, lib. 4. p. 229. 22 *Affiz.* pl. 65. *F. N. B.* 125. *Godbolt* 122. *Coney's Case*. *Fitz-H. Abridgment*, Title "*Admeasurement*:" pl. 6. the Note: (*S. C.* with 22. *Affiz.* pl. 65.) *Yelv.* 104. *Hoddesdon, Miles, v. Gresil*: (*Vide Cro. Jac.* 195. *S. C.*) 9 *Co.* 112. *Robert Mary's Case*. *Style* 428. *Bronge and More.* 1 *Lutw.* 107. *Hassard v. Cantrell.* 2 *Lutw.* 1238. *Dixon v. James.* *Freeman's Reports* 273. *S. C.* 2 *Lord Raym.* 1186. *Follet v. Troake et al.*

Serjeant *Davy*, premising "that a *Commoner* may undoubtedly "distrain the Cattle of a STRANGER Damage-feasant," argued that a *stinted Commoner* who surcharges is a *Stranger*, as to the *surplus* Number: And a Distress lies against him for the *surplus* Cattle.

46 *Ed.* 3. 12. b. pl. 13. 1 *Ro. Abr.* 665. Title "*Distress*;" Letter C. pl. 3. *S. C.* Serjeant *Could's* Note of *Dixon v. James*: (Which says "that the Court took Time to consider.") *Yelv.* 129. *Kinrick v. Pargiter.* 1 *Ro. Abr.* 405. Title "*Commoner*;" pl. 6. between *Trulock and White.* *Freeman* 273. *Dixon v. James.*

Hort

Hort v. Curtis et al. in C. B. Mich. 32 G. 2. Rotlo' 630, 631. 632.

Serjeant *Burland*, in his Reply, observed, that the Case of *Kinrick v. Pargiter*, in *Yelv.* 129. is likewise reported in *Gro. Jac.* 208. and *Noy* 130. and all different: But it was of no Authority, he said, against him.

LORD MANSFIELD—It is proper, in such a Case as this, to give the Opinion of the Court with * *Precision*. Therefore let it stand over, for our Opinion.

HIS LORDSHIP now declared their Opinion; and after having shortly stated the Pleadings, proceeded to the following Effect—

Upon this Demurrer, The Point insisted on, for the Plaintiff, was—That the Defendant *Harding* having no greater Interest in the Place in which &c, than a *mere Right of Common*, he could not lawfully *distrain* the Cattle of *another Commoner*, for any *Surcharge* whatsoever; but that his proper Remedy must be either by a Writ of *Admeasurement* of Common, or by the usual *Action on the Case*.

On the other hand, it was contended, for the Defendants, That this being a *stinted* Right of Common, the Defendants might lawfully *distrain* the Overplus.

To deduce this Conclusion, it was, in the first Place, alledged as a general and established Proposition, “ That a Commoner “ may undoubtedly *distrain* the Cattle of a STRANGER:” And then it was argued, that in all *stinted* Rights of Common, the *supernumerary* Cattle have *no Colour of Right* to depasture upon the Common; and therefore may properly be considered as the Cattle of a mere Stranger; and, *as such*, may be *distained* by any of the Commoners.

For this Purpose, an Authority was cited from the Year-Book of the 46th of *Edw. 3. fo. 12.* where, in *Replevin*, the Defendant pleaded first, “ that the Taking was in another Place;” and in order to have a Return, alledged “ that the Plaintiff had “ Common for so many Beasts only; and that he put in *more* “ than he ought; and therefore the Defendant took the *Over-plus* Damage-feasant.”

* The very great Accuracy and Copiousness with which this Intention was afterwards executed, is the only Reason why I have not (in so curious a Case) given the Arguments of the Counsel, and the Cases cited by them, more at large.

But from that Case no clear Conclusion can be drawn; because, as *Lutwyche* observes, in the Case of *Dixon v. James*,* *that* * 2 *Lutw.* *Avowry* was for Damage-feasant generally, (that is, without saying "for a Damage to the Plaintiff's Right of Common;") and therefore it is more probable that it was the Owner of the Soil, who made that Avowry; for, a Commoner must avow more specially.

Another Case was cited from *Yelverton* 129. (the Case of *Kinrick v. Pargiter*,) where the Defendant distrained the Cattle of the Lord; suggesting a Custom "for the Lord to enjoy the Place in which &c, solely to himself till Lammas-day, but after that Day it should be common for the Tenants, and the Lord should put in only Three Horses:" And because the Lord had put in more than Three Horses, the Defendant (a Commoner) distrained the Overplus, as Damage-feasant. They were at Issue, upon the Custom: And the Issue was found for the Custom, again the Lord. *Yelverton* moved in Arrest of Judgment, "That the Defendant, being only a Commoner, could not distrain the Cattle of the Lord, in the Lord's own Soil." But, according to that Report, *Fenner, Williams, and Crook* held the Distress to be good; because by that Custom the Lord was excluded except for his Stint, and all the Vesture and Benefit of the Soil belonged to the Commoners; and that they had no other Remedy to preserve their Interest in feeding their Cattle there, in case of the Lord's offending against the Custom; and that the Custom made the Lord, in that respect, as mere a Stranger as any other Person; and clearly a Commoner might distrain the Cattle of a Stranger Damage-feasant. But the Chief Justice and † *Yelverton* doubted; and thought that the Defendant ought to have alledged a particular Custom "to distrain the Cattle of the Lord."

† Sir Christopher Yelverton, (I imagine) The Reporter was Sir Henry.

This Case is also reported in *Cro. Jac.* 208. But in 2 *Ro. Abr.* 267†. where the same Case is mentioned, it is said to be determined "that this Prescription was bad; for that the Lord can not be so stinted."

† Title "Prescription;" Letter L. pl. 2.

What the real and ultimate Determination of that Case was, does not certainly appear: And therefore no decisive Conclusion can be drawn from it.

The chief Argument to maintain it, was by considering the Commoners as possessed of the whole Vesture of the Land, after *Lammas-day*; subject only to the Lord's Privilege of putting Three Horses there; that is, by turning the Tables upon the Lord, and considering him in the Light of a Commoner, and Themselves as possessed of the Soil and Vesture during the Time prescribed for.

But as the Lord had the Land entirely to himself at all other Times of the Year, and even in the Commoning Season was not *totally* excluded, the Commoners could hardly have a Right to distrain any Cattle of the Lord's, when he was clearly intitled to put *some* Cattle there, and (though he exceeded his Number) had a *Colour* of Right.

In the Case of *Trulock v. White*, 1 Ro. Abr. 405, 406. where the Lord's Cattle were distrained by a Commoner, the Land was by the Custom to be *entirely fresh*, every Second Year, till *Lady-day*: And therefore, during that Season, the Lord was *totally excluded* and had *no Colour* for putting any Cattle there at all.

* Vide Danvers's Abr. vol. 1. pl. 6. in Margine; and the Cases there referred to.

But where there is *no such Exclusion*, it is an established * Rule, "that a Commoner *can't* *distrain* the Cattle of the Lord, for overcharging the Common."

In the Case of *Hoddesdon v. Gresil*, Yelv. 104. it was agreed by all the Judges, "that if the Lord surcharges the Common, "the Commoners *can not drive the Lord's Beasts out*: But they "may distrain the Cattle of a *Stranger*, or may drive them out "of the Common." And the Reason there given is this—"For, a Stranger has not any *Colour* to have his Beasts there."

But if there be *no Custom to exclude the Lord totally* during the Commoning Season, his Property in the Soil would at least give him a *Colour* for putting his Cattle there: And though he overcharged the Common, no Cattle of the Lord's can be deemed *Trespassers*, or the Lord a *Stranger* in his own Soil. The Commoners therefore could have no Authority in themselves to take an immediate and summary Execution against the Cattle of the Lord, by distraining them Damage-feasant, as they may the Cattle of a *Stranger* who has no Pretence or Colour of Right.

From *these* Cases, therefore, which were cited for the Defendants, no Argument can be drawn to the present Point.

The Case of *Dixon v. James*, (which is in 2 Lutw. 1238. and Freeman 273.) was mentioned on both Sides. The Right of Common, in that Case, was for all Cattle *levant and couchant* upon the Estate: And the Question was "Whether one Commoner can distrain the Cattle of another Commoner, for overcharging." There was a Rule to shew Cause why the Judgment should not be arrested; upon the Objection "that the "Commoner could not distrain a Fellow-Commoner's Cattle." But *Freeman's* Report of that Case was cited for the Defendants; because it is there said to be agreed "that where a Commoner " was

“ was intitled to Common for a *certain Number* of Cattle, (as
 “ for Ten, or any other *certain Number*;) there if he surcharged,
 “ another Commoner *might distrain*.”

It is unnecessary to give any Opinion as to the Commoner's Right of distraining where the Number is *absolutely certain*; that is, where the other Commoner's Claim is for Ten, Twenty, or Thirty, *without* any Relation to the *Quantity of Land*. For, in the present Case the Prescription is for “ *Two Sheep* for EVERY ACRE “ *of Land*.” And therefore the whole Number is *not* absolutely certain *in it self*, but *depends* upon the *Number of Acres* which the Commoner is possessed of. And there is this essential Distinction between the two Cases—that in the former, the Overcharge is *clear and self-evident*; (for, it requires no Judgment or Proof, to decide whether Twenty are more than Ten;) and in *fact* a Right of Common, there would be no *Colour* of Right for the overplus Number: But in the latter Case, where the Number of Cattle to be pastured *depends on the Number of Acres* which the Commoner is possessed of, it requires a *Medium* to determine the proper Proportion or Number of Cattle, that is, an *Admeasurement* of the Commoner's Land. And when the Question depends upon a *collateral Fact*, or upon a Matter of *Judgment*, the Party interested can never be a competent Judge in his own Cause.

The *ancient Remedies* for a Commoner, when the Common was overcharged, were these Two*. If the Surcharge was by the Lord, the Remedy was by *Affise*: If by another Commoner, the Relief was by a Writ of *Admeasurement*. But in *Robert Mary's Case*, (9 Co. 112.) it was determined, “ that an *Action on the Case* would lie.” And that Action may be maintained, either against the Lord, or against a *Fellow-Commoner*. But in all those Remedies, as the Lord, or the other Commoners, have a *Colour* of Right, the Question “ Whether he has *exceeded* that Right” must be determined by an indifferent and competent Jurisdiction, and not by the Commoner himself. The Commoner therefore could not lawfully *distrain*: For, that would be making himself his own Judge, in a Matter that was uncertain in itself; and taking an immediate Execution, upon his own Judgment. The *Levancy and Couchancy*, where *that* is the Measure of the Commoner's Right, must be tried and determined by a *Jury*. And in the present Case, where the Number of Cattle to be put on depends upon the Number of the Commoner's *Acres*, the same Jurisdiction must decide between them, “ *What Number of Acres* “ the Commoner is really possessed of.” It is, in Effect, the *same Object* of Inquiry, as *Levancy and Couchancy*: And it is now established “ that where the Right of Common is for Cattle *levant and couchant*, one Commoner can not *distrain* the “ Cattle of another, for a supposed Overcharge.”

* Bracton,
 lib. 4. p. 222.
 F. N. B. 125.

UPON THE WHOLE, The Right of *distraining* seems to turn upon this—That wherever there is a COLOUR of *Right* for putting in the Cattle, a Commoner *can not distrain*; because it would be judging for himself, in a Question that depends upon a more competent Inquiry: But where Cattle are put upon the Common, *without* any Colour or Pretence of Right, the Commoner *may distrain* them; and therefore he may distrain the Cattle of a *Stranger*. But here, the Plaintiff *had* a COLOUR for putting in his Cattle; though, in Fact, he might exceed the due Number. He might put them in under the Idea or Pretence of having *more Acres* of Land, than he *really* had. And though, in the Pleadings, he has *stated* his Number of Acres to be only Eight; yet the Question, as to the *Right of distraining*, depends on the *Nature of the Common*, and not on the particular Facts. In Cases where a Writ of *Admeasurement* lies between Commoners, One *can not distrain* the Other: He can not, for his own Benefit, admeasure the Right of the Other. Therefore we are all of Opinion that this Distress was illegal and bad: And the Plaintiff must have Judgment.

JUDGMENT for the PLAINTIFF.

Bidmead *versus* Gale, the Younger.

LORD MANSFIELD on the same Day (the last Day of the Term) delivered the Resolution of the Court in this Case also.

It was an Action of Covenant brought upon Articles to run a *Horse-Match*. The Agreement was, that Each should start his Mare; and that if either should refuse or neglect, he should forfeit and pay 25*l.* to the Other. So that it was a Match for 25*l.* each Side; Play, or pay: But the Plaintiff was to pay the Defendant Five Pounds beforehand, as a Consideration to induce him to make the Match. The Defendant afterwards refused to run the Match. Whereupon the Plaintiff brought this Action against him, for the 25*l.* and assigned the Breach of Covenant, in the Defendant's not starting his Mare. The Cause was tried before Baron *Perrott*, who considered it as a Match for 50*l.* and directed a Verdict to be found for the Plaintiff, with Liberty to move in Arrest of Judgment.

A Motion in Arrest of Judgment was accordingly made, on Friday 5th May 1769, by Mr. *Hall* and Mr. *Price*, and defended by Mr. *Asburst* and Mr. *Selwyn*.

I

After

After some little Litigations “Whether Horse-Racing was a Game, within 16 C. 2. c. 7. or 9 Ann. c. 14.” and “Whether this Deed was a Security made void by 9 Ann. c. 14.” and a Discussion of a Case in 2 Lord Raym. 1366. *Burgefs v. Bracher*, where no such Exception was taken; and of another Case in 2 Strange 1159. *Goodburn v. Marley*, where Horse-Races are holden to be within the Acts against Gaming; it was reduced to this single Question—“Whether this was a Match for Fifty Pounds; or for less than Fifty Pounds.” If it was for less than 50*l.* it is prohibited by 13 G. 2. c. 19. *sect.* 5. which enacts “that no Person shall start or run any Match with or between any Horse Mare or Gelding, for any Sum of Money, Plate, Prize, or other Thing whatsoever; unless such Match shall be started or run at *Newmarket* or *Black Hambleton*, or the said Sum of Money, Plate, Prize, or other Thing be of the *Real and Intrinsic Value* of FIFTY Pounds, or upwards.”

The Defendant’s Counsel endeavoured to shew, that this was only a Match for 25*l.* as neither Party could lose more than that Sum; or, at the utmost, a Match for 45*l.* as the Total of both Sums *risqued* amounted to no more; for, there was *no Risque* remaining upon the Five Pounds which the Defendant had received from the Plaintiff, and had safe in his Pocket, without Possibility of losing it upon this Match.

The Plaintiff’s Counsel argued, that the Sum run for was most manifestly Fifty Pounds; and that the advancing Five Pounds certain made no Sort of Difference: The Plaintiff only gave the Defendant 5*l.* to run a Match with him *for Fifty*.

THE COURT, as it turned upon the Construction of a general Act of Parliament, took a few Days to consider.

And now LORD MANSFIELD declared, that they were ALL of Opinion “that this was *not* a Match for less than Fifty Pounds:” And therefore the Judgment ought not to be arrested.

THE RULE to shew Cause why the Judgment should not be arrested, was discharged: And the *Poslea* was ordered to be delivered to the Plaintiff.

☞ This was clearly a Match for 50*l.* though the Stakes were unequal.

Bidmead contributed 25*l.* — 5*l.* = 30*l.*
Gale contributed - 25*l.* — 5*l.* = 20*l.*

—————
 50*l.* the Stake to be run for.

As *Bidmead* contributed 30*l.* and *Gale* only 20*l.* (that is, Three to Two,) it may be supposed that *Bidmead's* was the better Mare, in the Proportion of Three to Two; and that his Chance of winning was in the same Proportion of Three to Two. And if they had agreed to divide the Stake of 50*l.* without running the Match at all, *Bidmead* ought to take up 30*l.* of it; and *Gale*, only 20*l.*

If it had been an *equal* Chance “*Whose* Mare should win;” *Bidmead* would, in such Case, have been very imprudent in betting three to two: Because, the Chance of winning being (*ex hypothesi*) *equal*, the true Value of such equal Chance would be 25*l.* a Piece; whether they should run the Match, or agree to divide the 50*l.*

In *either* Case, the Stake was 50*l.* whether it should be run for, or divided without running. If run for, it would have been a Match for *Fifty* Pounds.

And I imagine, that the Law of *Westminster-Hall* does here happily coincide with the Laws of the Turf.

The End of *Easter* Term 1769, 9 Geo. 3.

Trinity Term

9 Geo. 3. B. R. 1769.

Rex *versus* Inhabitants of St. Bartholomew's the Less. Friday 26th
May 1769.

THIS was a Rule to shew Cause why the following Order of Sessions, (made at the General Quarter-Sessions holden for the City of *London*, at *Guildhall*, on the 10th of *January* 1769,) for *quashing* a Rate made for the Relief of the Poor of the Parish of *St. Bartholomew the Less, London*, should not be *quashed* for the Insufficiency thereof.

WHEREAS at the General Sessions of the Peace &c, holden for the City of *London*, at the *Guildhall* within the said City, on *Monday* the 16th Day of *May* in the Eighth Year of the Reign of our Sovereign Lord *George* the Third &c, the Mayor Commonalty and Citizens of the City of *London*, Governors of the House of the Poor commonly called *St. Bartholomew's Hospital* near *West-Smithfield London*, of the Foundation of King *Henry* the Eighth, did exhibit their Petition and Appeal, setting forth,
 “ that *St. Bartholomew's Hospital*, situate in the Parish of *St.*
 “ *Bartholomew the Less*, is of ancient and royal Foundation,
 “ granted and established by King *Henry* the Eighth, for the Re-
 “ lief of sick lame wounded and diseased Poor, wherein some
 “ Thousands of poor Objects are annually relieved and cured;
 “ and that soon after the great Fire of *London*, Houses and Shops
 “ were made in the said Buildings, within the Cloisters and Pre-
 “ cinct of the Hospital, for the Convenience of the Inhabitants
 “ of *London* (then in great Distress for Houses,) who, occupy-
 “ ing the same as Tenants to the Hospital, for their own Bene-
 “ fit, became rateable and chargeable to the Poor-Rates; and
 “ that about the Year 1730, some of the ancient Buildings and
 “ Wards of the Hospital, and some of the said Houses and
 “ Shops, having become ruinous, were *pulled down*; and since
 “ which, by the Donation of Governors and other Benefactors,

“ *Four large Piles of Buildings* have been progressively erected,
 “ and are now USED *for the Hospital*; One of which Pyles or
 “ Wings contains a *Hall, Compting-House, and other Rooms,*
 “ which are used for *Meetings of the Governors, receiving Rents,*
 “ *Examining and Admission of Patients*; and the other Three
 “ Pyles of Buildings are used for Wards for the *Patients and*
 “ *their Nurses only*; and that One of the said Pyles or Buildings
 “ of the Hospital being finished about the Year 1758, the
 “ Churchwardens and Overseers of the Poor and Inhabitants
 “ of the Parish of *St. Bartholomew the Less,* by a Rate, intituled
 “ a Rate or Assesment on the INHABITANTS and OCCUPIERS
 “ of Lands, Houses, Shops, Sheds, Tenements, and Ware-
 “ houses, within the Parish of *St. Bartholomew the Less, Lon-*
 “ *don,* made and assessed by them the Churchwardens and Over-
 “ seers of the Poor and Inhabitants of the said Parish, whose
 “ Names are thereunto subscribed, pursuant to the several Acts
 “ of Parliament made in that behalf, for Three Months, for or
 “ towards the Relief of the Poor of the said Parish, as their
 “ Necessity shall require, have assessed and rated the Petitioners,
 “ *for such Wards of the said Hospital,* at and after the Rate of
 “ Twenty Pounds a Year, for and towards the Relief of the
 “ Poor of the said Parish, as followeth, that is to say, *The Mayor*
 “ *Commonalty and Citizens of the City of London, Governors of the*
 “ *House of the Poor,* commonly called *St. Bartholomew's Hospi-*
 “ *tal near West-Smithfield London,* of the Foundation of King
 “ *Henry the Eighth,* for Lands *on which stood Tenements and*
 “ *Houses* BY THEM PULLED DOWN AND DEMOLISHED; the
 “ Tenants whereof were *used to be charged* in the Poor's Rate,
 “ 5*l.* quarterly; and that the Parish have *continued* such Rate
 “ *upon such Wards for the Poor,* ever since; to the Detriment and
 “ Loss of the Charity; AND that about the Year — an *Elab-*
 “ *oratory* also hath been erected for the Service of the *Hospital*
 “ *only,* upon Ground within the Liberty and Precinct thereof;
 “ which the said Churchwardens Overseers and Inhabitants
 “ have assessed after the Rate of 2*l.* 18*s.* 6*d.* a Year, as follow-
 “ eth, that is to say, *The Mayor and Commonalty and Citizens of*
 “ *the City of London, Governors of the House of the Poor,* com-
 “ monly called *St. Bartholomew's Hospital,* near *West-Smithfield*
 “ *London,* of the Foundation of King *Henry the Eighth,* for
 “ their *Elaboratory, where several Houses stood, which were used*
 “ *to be charged in the Poor's Rate,* 12*s.* quarterly; which late
 “ hath been continued, and now continues to be rated, to the
 “ Detriment and Loss of the Charity; AND that all the said
 “ Four Pyles of Buildings being finished in 1766, the Governors
 “ pulled down Nineteen old Houses and Shops, (Part of the
 “ said ancient Buildings,) to make an *Area* to the Hospital, for
 “ the Benefit of the Patients; which is a void unoccupied Space
 “ of Ground, of about 66 Yards by 60; for which, the said
 “ Parish-

“ Parish-Officers have assessed and rated the said Governors after
 “ the Rate of 41*l.* 5*s.* a Year, as followeth, that is to say,
 “ The Mayor Commonalty and Citizens of the City of *London*,
 “ Governors of the House of the Poor, commonly called *St.*
 “ *Bartholomew's* Hospital near *West Smithfield, London*, of the
 “ Foundation of King *Henry* the Eighth, for Lands on which
 “ stood Tenements and Houses (within the Quadrangle of the
 “ said Hospital, besides such as were before by them pulled
 “ down and demolished,) by them pulled down and demolished,
 “ the Tenements whereof were used to be charged in the Poor's
 “ Rate 10*l.* 6*s.* 3*d.* quarterly; and which said Sums of 20*l.*
 “ 2*l.* 8*s.* and 41*l.* 5*s.* making, in all, 63*l.* 13*s.* a Year
 “ (over and above what is charged upon their respective Offi-
 “ cers residing in the said Hospital,) was for the Year 1767,
 “ and now continues to be assessed and rated on the said Gover-
 “ nors, in respect of the Premises; AND that the Petitioners
 “ were advised and humbly insisted, that the Petitioners Servants
 “ or poor Patients, Inhabitants or Occupiers of the said Pre-
 “ mises, are *not liable*, nor ought to be charged *any Thing*, to
 “ the Poor's Rate, in respect of the said *Hospital-Elaboratory*, or
 “ *void Space of Ground*: And therefore the Petitioners humbly
 “ appealed from such Rate and Assessment, in regard to the
 “ abovementioned Sums of Money.” AND WHEREAS the final
 Hearing and Determination of the Matter of the said Appeal
 stands duly adjourned unto the present Sessions by divers Orders;
 Now, upon hearing what is alledged, as well on behalf of the
 said Mayor and Commonalty and Citizens Governors as aforesaid,
 as on behalf of the Churchwardens and Overseers of the Poor of
 the said Parish of *St. Bartholomew the Less*, touching the Premises;
 and upon full Examination of the Matter of the said Petition and
 Appeal; IT DOETH APPEAR in Evidence to this Court, and is ad-
 mitted by all Parties, That *Henry* the Eighth late King of *En-*
gland, by Charter, bearing Date the 13th Day of *January* in the
 38th Year of his Reign, did, amongst other Things, grant to
 the Mayor and Commons and Citizens of the City of *London*,
 all the late Hospital of *St. Bartholomew*, in *West Smithfield* next
London, and all other Things whatsoever to the said Hospital ap-
 pertaining or belonging; and also all the Scite, Compass, Cir-
 cuit and Precinct, and the Close of the said late Hospital; and
 by his said Charter did grant to the said Mayor and Commons
 and Citizens, Lands, Houses, Gardens, Rents, Reversions, and
 Hereditaments, amounting to a considerable Value; to hold and
 enjoy the same for ever, to their own proper Use and Behoof;
 and thereby directed that the said late Hospital of *St. Bartholo-*
mew's should thereafter be a Place and House for the Poor there
 to be placed, and should be called “ The House of the Poor, in
 “ *West Smithfield* next *London*, of the Foundation of King *Henry*
 “ the Eighth.” It appears, that ever since the said Grant, the
 PART IV. VOL. IV. 6 P said

faid Hospital has been made Use of for the Relief of sick wounded and diseased Poor, where Thousands are annually relieved and cured; and that soon after the great Fire of *London*, Houses and Shops were made in the Buildings within the Cloisters and Precinct of the Hospital, for the Convenience of the Inhabitants of *London* (then in great Distress for Houses,) who, occupying the same for their own Benefit, became rateable and chargeable to the Poor's Rates. That about the Year 1730, some of the *ancient* Buildings and Wards of the Hospital, and some of the said Houses and Shops having become ruinous, were pulled down; and, by the Donation of the Governors and other Benefactors, Four large Piles of Buildings have been progressively erected, and are now used for the Hospital; One of which Piles or Wings contains a Hall, a Compting-House, and other Rooms, which are used for Meetings for the Governors, receiving Rents, and Examining and Admission of Patients, a House for the Clerk, and Apartments for the Steward; and the other Three Piles of Buildings are used for *Wards for the Patients and their Nurses only*; and that an *Elaboratory* also has been erected, for the Service of the *Hospital only*, upon Ground within the Liberty and Precinct thereof.

That one of the said Piles or Buildings of the Hospital being finished about the Year 1758, the Churchwardens and Overseers of the Poor of the Parish of *St. Bartholomew the Less*, assessed and rated the said Governors, *for such Wards for the Poor*, the Sum of 20*l.* for and towards the Relief of the Poor of the said Parish, as and for Lands *on which stood* Tenements and Houses by them pulled down and demolished, the Tenants whereof *were used to be charged* in the Poor's Rate at 8*s.* 4*d.* weekly; and have *continued* that Rate, ever since. And that the said Parish-Officers have assessed and rated the Governors to the said Parish Poor's Rate, 2*l.* 8*s.* *per Annum*, for and in respect of such *Elaboratory*, where Houses stood, which were *used to be charged* to the Poor's Rate, by quarterly Assessments.

That all the said Four Piles of Buildings being finished in 1766, the Governors pulled down Nineteen old Houses and Shops (Part of the said ancient Buildings,) to make an *Area* to the Hospital, for the Benefit of the Patients; which is a *wide Space* of Ground, of about 66 Yards by 60; for which, the Parish-Officers have assessed and rated the said Governors at 41*l.* 5*s.* *per Annum*; which is 10*l.* 6*s.* 3*d.* *per Quarter*; and which said Sum of 2*l.* 8*s.* 20*l.* and 40*l.* 5*s.* making, in all, 63*l.* 13*s.* are over and above what is charged upon their respective Officers residing in this Hospital, and were for the Year 1767, and now continue to be assessed and rated on the said Governors, in respect of the Premises.

AND it further appears to this Court in Evidence, and is admitted by all Parties, that several Persons who have gained Settlements in the Houses so pulled down, have been and are now relieved by the said Parish of *St. Bartholomew the Less*.

WHEREFORE this COURT doth allow the said Appeal, and doth *quash* the said Rate, so far as respects the several Assessments abovementioned: And the same is hereby quashed.

By the COURT—

HODGES.

This Order being removed hither by *Certiorari*,

The QUESTION was—"Whether the Governors of the Hospital are or are not *rateable to the Poor*, in respect of the Buildings and Area above mentioned."

LORD MANSFIELD—The Poor-Rate must be charged upon the *Occupiers*. In the Case of *St. Luke's Hospital**, and in the Case of *Chelsea Hospital*, the *Officers* were rateable, *as Occupiers*. The *Corporation* are not, *de facto*, the *Occupiers*. The *Poor* are *Occupiers*: But they are not rateable. * Vide ante, vol. 2. p. 1053.

The general Rule of Law must be followed. That Rule is "That you must *find an Occupier*†, to be rated." The *poor* People *can not* be rated at all. The *Servants* can not be rated *as Occupiers*: Nor can the *Corporation* be charged, *as Occupiers*. † Vide ante, 1063. accord.

The Consequence is, that the Rule must be discharged.

ORDER OF SESSIONS AFFIRMED.

Gros *versus* Nash.

Monday 5th
June 1769.

NOTE—A *Scire facias* in *Error* needs not lie in the Office Four Days before the Return of it; as a *Scire Facias* against *Bail* must‡. ‡ Vide ante, 1723 Millar v. Yerraway, accord.

Mayor *versus* Steward.

Tuesday 6th
June 1769.

THE Declaration states that by Indenture dated 11th July 1761, which recited a former Indenture of the 14th June 1760, whereby *Jonathan Clarke* demised to the Plaintiff and Defendant, then *Brewers and Copartners*, a *Malthouse* and other Buildings

Buildings at *Knightbridge*, for Fifteen Years and Three Quarters, at the yearly Rent of 18 *l.* the Plaintiff released to the Defendant all his Estate and Interest in the same Malthouse and Premises, for the Residue of the Term. And the Defendant covenanted with the Plaintiff, by this latter Indenture, that he the said Defendant would pay the yearly Rent of 18 *l.* and perform the Covenants on the Lessee's Part, and indemnify and save harmless the Plaintiff on Account thereof. All which he had neglected and refused to do. The Breach was assigned in Non-Payment of the Rent; in not repairing the Premises; and in not indemnifying the Plaintiff; to his Damage 300 *l.*

The Defendant pleaded Three Pleas. 1st. That he became a Bankrupt after the making of the Indenture dated 11th *July* 1761; and that the Causes of Action accrued to the Plaintiff before he (the Defendant) became a Bankrupt. And of this, Issue was joined.

There were Two other special Pleas in Bar: One as to the Non-Payment of the Rent, and not indemnifying the Plaintiff; the other, as to the not repairing. They were Both to the same Effect. They stated the Commission, and the Assignment of his Effects; and that he had duly conformed to the several Statutes concerning Bankrupts, and had duly obtained his Certificate.

To the First Plea, the Plaintiff (as is before mentioned) joined *Issue*: To the Second and Third, he *demurred*, generally; and there were Joinders in Demurrer.

The Issue was tried before Mr. Justice *Aston*, in *Michaelmas* Term last; when a Verdict was found for the Plaintiff, and Damages 44 *l.* 13 *s.* subject to the Opinion of the Court upon the following

CASE—That the Plaintiff and Defendant were Partners in the Trade of a Brewer, at *Knightbridge*; and were joint Lessees of the Malthouse and other the Premises mentioned in the Declaration.

The Defendant purchased the Plaintiff's Share of the Stock in Trade, in Consideration of 5 *l.* and took an Assignment of the said Lease, dated 11th *July* 1761, and containing the several Covenants mentioned in the Declaration.

The Plaintiff was also Original Lessee, with former Partners in the said Trade, of a Brewhouse together with 15 public Houses, as appurtenant to their Trade.

The Brewhouse and the several last mentioned Leases were also assigned to the Defendant by the abovementioned Deed, and

under like Covenants; and he became possessed of the several Premises therein mentioned.

Afterwards, on 15 Nov. 1764, a Commission of Bankruptcy issued against the Defendant: And *Nathaniel Mason* and *Dyer Bond* were chosen Assignees; and a regular Assignment was made to them of all the Estate and Effects of the Bankrupt.

The Assignees entered on the said Brewhouse and Malthouse, and stripped all the Fixtures and Utensils therefrom; and sold and assigned the Leases of all the public Houses, to Messrs. *Chase* and *Cox*, Brewers, in Consideration of 700 *l.* or some such Sum of Money; and, having so stripped the Premises, used their Endeavours to dispose of the Leases of the Malthouse in Question and of the Brewhouse, both by public Auction and by private Contract; but not being able so to do, they abandoned the Premises at *Lady-Day* 1765, as unprofitable; and sent the Leases and Keys to the Plaintiff, having first paid the Rent up to that Time.

The Plaintiff thereupon refused to accept the Possession, from the Assignees, of the Brewhouse and Malthouse alone; or to have any Thing to do with those Premises or the Leases or Keys thereof; but offered to accept a Re-assignment of the *Whole* of the Leasehold Premises assigned by him to the Defendant, *entire*: Which the Assignees refused. And the legal Estate, as well as Possession, is now vested in them.

The Plaintiff filed his Bill in the Court of Chancery, against the Assignees and the Defendant the Bankrupt, 14 *March* 1767; and therein alledged “ That he had been damnified in respect of
“ the Malthouse mentioned in the Declaration 28 *l.* 1 *s.* and was
“ still liable to the Rents and Repairs of those Premises during
“ the Remainder of the Term of the Lease: He therefore
“ prayed that the Assignees might be decreed to pay him the
“ said 28 *l.* 1 *s.* and to indemnify him out of the Bankrupt’s
“ Effects, against the future growing Rents; and might retain
“ sufficient in their Hands for that Purpose, and not divide the
“ same until the Plaintiff should have been released and dis-
“ charged from the Covenants in the said Lease.”

The Cause came on to be heard before the Lord Chancellor, the 10th *May* 1768: And a Decree was made to the following Effect; *viz.* “ That the Plaintiff should be at Liberty to come
“ in as a Creditor, under the said Commission against the Defen-
“ dant, for the Sum of 28 *l.* 1 *s.* and to prove any other Sums
“ that he hath been damnified by the Covenants in the Original
“ Lease, since filing his Bill; and to receive a Dividend in re-
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“ spect thereof, in Proportion with the Rest of the Creditors
 “ seeking Relief under the said Commission; and that the Rest
 “ of the Plaintiff’s Bill should stand dismissed.”

A final Dividend of the Bankrupt’s Estate was made on 28th *June* 1768: At which Time the Plaintiff was damnified by a Breach of the Covenant in the original Lease of the Malthouse, to the whole Amount of the Sum mentioned in the Declaration; viz. 54*l.* for Three Years Rent commencing at *Lady-Day* 1765 (when the Assignees abandoned the Malthouse,) and ending at *Lady-day* 1768; and One Guinea for Costs of an Action brought against him; making together 55*l.* 1*s.* And although the Plaintiff might have come in as a Creditor under the Commission, under that Decree, and have proved the Whole in Consequence thereof; yet he only came in as a Creditor for the said Sum of 28*l.* 1*s.* Part thereof, and hath received Two Dividends thereon, amounting to the Sum of 11*l.* 7*s.* and hath brought his Action to recover the Sum of 43*l.* 14*s.* being the Residue of the said 55*l.* 1*s.*

The Defendant obtained his Certificate on 7th *January* 1768: Which was duly allowed, and confirmed by the Lord Chancellor, on the 19th *February* following. The several Breaches of Covenant above mentioned happened *subsequent* to the Act of Bankruptcy, and the Defendant’s obtaining the said Certificate.

The Question therefore is—“ Whether the Plaintiff ought to
 “ recover.”

This reserved Case came before the Court on *Tuesday* last, the 30th of *May*; when Mr. Justice *Yates* observed, that the proper Question of Debate would be “ Whether the Bankrupt being
 “ divested of his All, and disabled from paying any Thing, is
 “ not also DISCHARGED from all Covenants.” But this Question can never come to a Determination upon *this Issue*. The *Demurrers* ought to have been argued first: And then the Question would have properly come before the Court—“ Whether the Bankrupt
 “ is not discharged from the *express* Covenant, when he is rendered absolutely incapable of performing it, by having surrendered his *All* to his Creditors under the Commission, in Conformity to the Statute concerning Bankrupts.”

The Court agreed that nothing could be done upon *this Issue*, to determine *that* Question.

The Case reserved at *Nisi Prius* was therefore Ordered to stand over, till the *Demurrers* should be argued.

Mr.

Mr. *Mansfield* now argued the Demurrers, on behalf of the Plaintiff.

The material Part of the Pleas is "That the Cause of Action accrued *after* the Bankruptcy."

The Covenant on which the Question upon the general Plea arises, is a Covenant to indemnify the Plaintiff against the Covenants of the original Lease.

The Plaintiff can not be barred of his Action otherwise than by 5 G. 2. c. 30. § 7. which discharges conforming Bankrupts from all Debts *due or owing at the Time* of their becoming Bankrupts. But this was *not* a Debt *due or owing* at the Time of his becoming a Bankrupt. This Plea indeed alledges "that the Cause of Action accrued *before* the Bankruptcy." But the Evidence proves "that it did not arise till *after*:" It was *contingent* till after the Bankruptcy.

Mr. Justice YATES—No Doubt, the Act does not *discharge* the Bankrupt from contingent Debts. But as it deveys him of his whole Estate, and renders him *absolutely incapable of performing the Covenant*, it would be a Hardship upon him, if he should remain still liable to it, when he is disabled by the Act of Parliament from performing it.

Mr. *Mansfield*—Then, putting the special Case reserved at *Nisi Prius* out of the Question, and taking it up upon the Two *other* Pleas—This is a Covenant by the Bankrupt, to indemnify the Plaintiff against Covenants contained in a Lease: Which Lease was assigned by the Plaintiff, with all his Interest in it, to the Defendant, for his (the Defendant's) sole Benefit; and he covenants to indemnify the Assignor.

This Covenant to indemnify the Assignor who has parted with all his Interest to him; and to pay the Rent, and repair the Premises now become his own sole Property, is but just and reasonable: And the Bankrupt can not be discharged from it; the Covenant being an *express* Obligation.

And there is no more Hardship in subjecting the Bankrupt to *this* Demand, than to any other contingent Demand.

Neither is there any Difference between the Bankrupt's undertaking to indemnify against his *own* not paying Rent, and his undertaking to indemnify against *another Person's* not paying Rent.

It is settled, " that *contingent* Debts are not discharged by a " Certificate under a Bankruptcy." 2 *Strange* 865. *Tully v. Sparkes*. 2 *Stra.* 1043 *Hockley v. Merry*. 2 *Stra* 1160. *Crookshank v. Thompson*—A Bond " to indemnify" is not discharged, where the Breach of the Condition is after a Bankruptcy.

Mr. Grose, *contra*, for the Defendant.

In this Action of Covenant, Three Breaches are assigned: *viz.* for Non-payment of Rent; for not keeping in Repair; and for not indemnifying.

The Defendant admits all the Charges; but pleads that he became a Bankrupt, and had surrendered up all his Effects under the Commission, and assigned them to his Creditors: And therefore it is impossible for him to perform Covenants.

A Man can not be bound by a Covenant, when the *Act of Law* has taken the Emolument from him, and vested it in another.

The Defendant is under these Circumstances: And the general Question is " Whether the Plaintiff can call upon *such* a Defendant, for the Performance of his Covenants."

He argued from the *Intention* of the Legislature in the Bankrupt Acts; and the *Decisions* of Courts of Justice in *Favour* of Bankrupts.

The Statute of 34 & 35 H. 8. c. 4. seems indeed to have considered Bankrupts as *Criminals*: But modern Statutes have only considered them as *unfortunate* Traders. (*Vide* 5 G. 2. c. 30.)

The Bankrupt is not now the real Tenant. He is so divested, that he has *no Remedy* against the *actual* Tenant: And therefore he ought not to be liable himself.

The Landlord is under no Hardship: For, he may *enter*, for Breach of the Covenant to pay Rent, and of the Covenant to repair.

In the Case of *Andrews v. Needham*, Noy 75 A Lessee for Years covenanted " to yield up at the End of the Term." *Blunt* entered by an Elder Title. The Defendant was holden to be discharged of his Covenant. For, if the Land is gone, the Obligation is discharged.

Here, the Land is gone; and the Bankrupt is deprived by Act of Law, of the Ability to perform the Obligation.

It was urged, "that here is an *express* Covenant."

But here the Premises are entirely gone *out* of the Defendant: He can never enjoy them. Therefore he ought not to be bound, even by an *express* Covenant.

On the *first* Plea—He argued "that the Cause of Action accrued *before* the Bankruptcy." And this, he said, might be collected from 5 G. 2. c. 30. and the Cases determined upon it; and it was the *Idea and Intention* of the Legislature: Though, he acknowledged, the *Words* were against him. He cited 2 *Stra.* 919. *Macarty v. Barrow*; and 2 *Stra.* 1196. *Graham v. Benton*. He owned that the anonymous Case in 1 *Atkyns*, p. 140. was against him: But that, he said, was afterwards over-ruled, on 6th August 1757, *ex parte Talbot*, before Lord Northington. He also mentioned a Case of *Francis v. Lutterel*, in Chancery, last Trinity Term, before Lord Camden, in *Hagen's* Bankruptcy. And he said, that in all these Cases, the Words of 5 G. 2. c. 30. were considered with great Liberality.

Here, what *was* due at the Time of the Bankruptcy, and what *would* be afterwards due, *might* have been liquidated.

This Covenant might have been considered as a *Security for the Rent*.

Mr. *Mayor* actually came in under the Commission, as a Creditor for *this very* Demand. Consequently, it was not a contingent Debt. The Court of Chancery has let him in, to prove it.

The whole Benefit of this Covenant accrues to the Bankrupt's Creditors: Therefore he himself ought not to remain liable.

Besides, Mr. *Mayor* having come in and claimed, and received a Dividend under the Decree, he ought not to have a Remedy against the Defendant's Person. It is an Oppression; and is so treated in 2 *Peere Williams* 395. He has already made his *Election*; and therefore ought not to be in a better Situation than the Rest of the Creditors, and have it in his Power to take out another Commission against the unfortunate Bankrupt.

Mr. *Mansfield*, in Reply—As to what Mr. *Grose* has last said—The *express Words* of the Act of Parliament are "That
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“ the Bankrupt shall be discharged from all Debts *due or owing*
“ *at the Time* of his becoming Bankrupt.”

The Contest before the Lord Chancellor was only between the Assignee and the *Creditors*; not between the Assignee and the *Bankrupt*.

Upon *this* Plea, the Plaintiff can not be barred.

As to the Hardship—It is just the same as in *other* contingent Debts.

If it had been the Intention of the Bankrupt-Laws, that contingent Debts should be discharged, the Legislature would have used other Language than they have done. This Man has *expressly* covenanted to do these Things: And therefore he is still bound.

I agree “ That the Act of Law shall do no Man an Injury.” But that does not apply to the present Case. No more does the Case cited from *Noy*.

The present Plaintiff can by no means get rid of this Lease. Nothing appears upon the present Record, whereby this Covenant to indemnify, can be discharged.

THE COURT were clearly of Opinion, That as this was not a Case between Lessor and Lessee, (in which Case it might have seemed hard to leave the Lessee liable to the Covenants, when an Act of Law had divested him of the Emoluments, and vested them in his Creditors;) but a distinct, detached, collateral, independent Covenant and Contract between the Plaintiff and Defendant; and the Plaintiff could have had no Remedy under the Commission; the Bankrupt was not discharged by the Certificate. It is his own express collateral Covenant; not a Covenant that runs with the Land. A third Person ought not to be prejudiced by the Bankrupt's Breach of it.

The Plaintiff could not have been *admitted* under the Commission, to have proved this as a Debt; For it was *not* a Debt at the *Time* of the Bankruptcy: It might, perhaps, never have been one.

Judgment ought to be for the Plaintiff.

JUDGMENT for the PLAINTIFF, upon the DEMURRERS: And (on the special Case) PLAINTIFF to have the POSTEA delivered to him.

Slaughter Esq. *versus* Bradock.

THE VENUE, originally laid in *London*, had been *changed* to the County of the *City of Chester*, upon the common Affidavit, on the Motion of Mr. *Ashburst*, made on behalf of the Defendant.

Mr. *Wallace* obtained a Rule for the Defendant to shew Cause why Mr. *Ashburst*'s Rule should not be discharged; on Affidavit "That the Cause of Action arose on a *By-Law of the City of Chester*; and that it could *not be fairly and impartially tried in the City of Chester*, because the Jurors were *interested*."

Mr. *Ashburst*, on behalf of the Defendant, now shewed Cause against this Rule. He did not pretend that the *City of Chester* was a *proper* Place to try the Cause in: But he urged the great Inconvenience of bringing up the Defendant's Witnesses from *Chester* to *London*; and proposed that the Venue should be laid in some County *adjacent to Chester*. But

LORD MANSFIELD observed, that *that* could not be: because the Cause of Action *did not arise there*. [*Vide post*, p. 2450. *Waddington v. Thellwell Esq.*]

THE COURT held, that as the Action was *transitory*, the Plaintiff had a general Right to lay it where he pleased; And the Venue should not be changed, if it appeared that the County in which the Cause of Action really arose was an IMPROPER County to try it in. And therefore,

Mr. *Wallace*'s RULE was made absolute.

Doe, Lessee of Hardman, *versus* Pilkington and Ruffel. Saturday 10th
June 1769.

IN EJECTMENT—A Rule had been made upon the Defendants, to shew Cause why, upon Payment of Costs, the *Declaration* delivered in this Cause should not be AMENDED, by striking out the Words "First Day of *May* in the Year of our Lord 1759," and inserting, instead thereof, "First Day of *November* in the Fifth Year of his said Majesty's Reign;" and by the striking out the Words "Thirtieth Day of *April*," and inserting, instead thereof, the "Thirty-first Day of *October*;" and also by striking out the "First Day of *May* in the Year of our Lord 1759," and inserting, instead thereof, "said First Day of *November* in the said Fifth Year of his said Majesty's Reign:" Upon the Motion.

Note—

Note—This Case was so circumstanced, that Plaintiff would have been *barred* by a Fine, if he had been put to bring a *new* Ejectment. For, the Declaration was delivered Four Years ago; when the Defendant pleaded; but nothing had been done since; the Plaintiff having been stayed by an Injunction out of Chancery, which had been but lately dissolved. The Ejectment was brought upon an Entry made to avoid a Fine: And the Plaintiff was now out of Time to make a new Entry.

On *Tuesday* the 6th of this Month, Mr. *Wallace* shewed Cause against thus amending the Declaration by altering the *Time* of the Demise; and cited *Cartbew* 178. *Bennett v. Gandy*; where Leave was prayed to amend the Declaration, by altering the *Time of the Demise*: But it was refused; because, if the *Time* was altered, that would make it a *new* Demise.

*I don't find this Case amongst my

own Notes. He also cited *P. 11 G. 2. B. R. Caseworth v. Thomas*; which, he said, was a like Determination*. But in 1 *Ventr.* 361. and 1 *Show.* 207. Holt Chief Justice held it *not* amendable. So is 2 *Barnes* 13. *Driver v. Scrutton*. So was *Raffey, ex dimiss. Lethieullier v. Hanbury*. *M. 5 G. 2. B. R.*

† In the 4th Edition, 'tis p. 17.

In 2 *Barnes*, 13†. *Driver, ex dim. Scrutton, v. Scrutton et al.* It was denied to amend the Demise in Point of *Time*; and said to be never done without Consent. And in 2 *Barnes* 154. *Roe v. Doe*, on the Demise of *Stephenson*—"It can't be amended in the *Demise*, or other Matter of Substance."

He cited, likewise, *Cartbew* 401. *Puleston v. Warburton*. 5 *Mod.* 332. *S. C.* and 2 *Strange* 1211. *Goodtitle v. Meymott*.

On the other Side, see the Case of *Astin v. Parkin, ante, vol. 2. p. 665.* where all the Judges unanimously held "That an Ejectment was to be considered as the *fictitious* Form of an Action invented under the Control of the Court, for Advancement of Justice; and a Mode to try the Right in Question."

And it was said, that on 15th *August* 1768, Mr. Justice *Yates*, sitting in Bank at *Lancaster*, ordered a Declaration in Ejectment to be amended. There was also a Case very liberal in Favour of Ejectments, which was not mentioned at all. It was *Small, ex dimiss. Baker, v. Cole and Skinner*, in *Easter Term* 1761, 1 *G. 3.* which see *ante, p. 1161.*

Mr. Justice *YATES* and Mr. Justice *ASTON* thought that the Plaintiff's being out of Time to make a new Entry was a Reason for amending; and cited the Case of *The Executors of the Duke of*

of *Marlborough v. Widmore*, in 2 *Stra.* 890. [and also, more at large, and rightly taken, in *Fitz-Gibbon* 193.] where the Declaration was amended by laying the Promise as made to the Executors, instead of the Testator; because the Plaintiff's Action would otherwise have been lost, by the Statute of Limitation's having run upon the Promise made to the Testator.

Lord MANSFIELD—An Ejectment is a mere fictitious Action. The Demise is mere Matter of Form: It does not exist. It is not like a real Title.

THE COURT'S final Determination was, however,
ADJOURNED.

Lord MANSFIELD now declared it—

It appears upon the Affidavits, that this was an Entry to avoid a Fine; and the Demise is laid *before* the Plaintiff had made the Entry, instead of being laid *after* the Entry.

We are all clearly of Opinion that he ought to be at Liberty to amend upon Payment of Costs.

Mr. Justice YATES—It is a clear Mistake of the Plaintiff's
* Attorney.

RULE made ABSOLUTE.

*Vide ante,
1162. Small,
ex Dim ff.
Baker, v. Cole
and Skinner

Beach, qui tam, *versus* Turner.

AN Action having been brought for *exercising* the Trade of a Currier, *without* having served an *Apprenticeship*, It appeared upon the Trial, that the Defendant was only a Journeyman. Whereupon Lord Mansfield nonsuited the Plaintiff. And

This was merely a Question upon *Eliz. c. 4. § 31.* “Whether the Statute extends to *Journeymen*, or only to *Masters.*”

On the last Day of last Term, Mr. Solicitor-General (*Dunning*) Counsel for the Plaintiff, obtained a Rule for the Defendant to shew Cause why the Judgment of Nonsuit should not be set aside, and a new Trial had.

Mr. Wallace, on behalf of the Defendant, now shewed Cause. He insisted “That a *Journeyman* is *not* within this Statute;” and cited *Hobbs, qui tam, v. Young*, 2 *Salk.* 610. *Carthew* 162. *S. C.* [It is also in 3 *Mod.* 313. *Comberb.* 179. and 1 *Shew.* 241, 266.]

Mr. Solicitor-General and Mr. *Walker*, in Support of the Rule, argued that the Act extends to the Journeyman, as well as to the Master; and that Both of them are within the true Meaning and Spirit of the Clause, and even within the *Expression* of it too. For, the Words are in the Disjunctive—"It shall not be lawful "to set up, occupy, *use, or exercise*." Now the Servant *uses and exercises* the Trade or Occupation as much as the Master; though perhaps he can't so well be said to *set it up*: And therefore the Legislature adopt the Words "*use or exercise*" the Craft Mystery or Occupation. They cited *Raymond v. Chase*: (Which may be seen *ante*, vol. 1. p. 2.)

LORD MANSFIELD—I continue of the same Opinion that I was of at *Guildhall*. There is a great Difference between *setting up* a Trade; and *working in it*. A Man may *work in it*, by doing a very trifling Part.

This Act of Parliament meant to prevent Persons from *setting up* the Trade, being unqualified for it; or *employing unqualified* Persons: But it did not mean to give a *Penalty* against *Both*. A Journeyman does not exercise the Trade.

I am satisfied that the Spirit of the Act means to prevent the *Master only*, from setting up the Trade, Himself being unqualified; or *employing unqualified* Persons; but that it was *not* intended against the *Journeyman himself*.

Mr. Justice YATES and Mr. Justice ASTON concurred.

Per CUR'. unanimously—

RULE DISCHARGED.

Monday 12th
June 1769.

Waddington *versus* Thellwell Esq.

UPON the First Day of this Term, Mr. *Kenyon* moved to *change the Venue* from *Middlesex* to *DENBIGHshire*.

But Mr. *Cowper*, the Clerk of the Rules, objected to the Regularity of a Motion "to change the Venue into a *Welch* "County."

The COURT, having the same Scruple, desired Mr. *Kenyon* to look into the Cases; particularly two in Sir *John Strange's* 2d Volume, *Moore v. Fernybough*, p. 1258, and *Tindale v.*

Gwynne, p. 1270; and a later Case in this Court, of *Richards et Ux. v. Traberne*, Pasch. 1755, 28 G. 2.

Mr. *Kenyon* answered, that though the Venue should be changed into a *Welsh* County, yet the *Process* would be directed into the next *English* County: So that it would be *tantamount* to changing it into the next *English* County.

It was adjourned, in Order that Mr. *Kenyon* might look into the Cases, and move it again.

On the Day following, (which was *Saturday* 27th of *May*,) Lord MANSFIELD told Mr. *Kenyon*, that the Cases of Motions to change the Venue into *Wales*, had been looked into; and that the Point remained *undetermined*.

Mr. Justice ASTON observed that it could not be removed into the next *English* County; *because* the Cause of Action did *not* arise there. Mr. Justice DENISON, when at the Bar, had in several Cases agreed to give material Evidence in the *Welsh* County. He said, He did not see why it might not be changed into *Wales*: And in the Case of *Richards et Ux. v. Traberne*, he mentioned the Case of *Sir Thomas Stradling v. Morgan*, in *Plowden* 200. where the Venue was laid at *Cardiffe* in *Glamorganshire*; and the *Venire facias* was awarded to the Sheriff of *Herefordshire*, the next adjoining County; to summon a Jury from the Neighbourhood of *Leominster* in *Herefordshire*, which is the Visne next adjoining to the Town of *Cardiffe*. The Reason why it can not be changed into the next *English* County is (as it was there said) “ that the Cause of Action did not arise in the County to which it is “ prayed to be changed.”

Though the Case of *Richards v. Traberne* was not determined*, yet the Arguments there used were very strong for changing the Venue into a *Welsh* County.

* It was argued on Monday 12th May 1755, by

Mr. Price (for changing the Venue from *Middlesex* to *Glamorganshire*;) and Mr. Hume Campbell and Mr. Aston (against changing it.) It was agreed, that Cases were both Ways. The Rule was enlarged: But it never came on again. I believe, the Cause was afterwards tried at *Hereford*.

It is a great Inconvenience, not to be at Liberty to change it into a *Welsh* County; but to be obliged to bring Witnesses to a great Distance.

† Though Sir John Strange made his Rule absolute, for changing the Venue from *London* to *Carmarthen*, on Affidavit of Service, in the Case of *Tindale v. Gwynne*; yet the Court would

† I have a Note of a Case in this Court, in Trin. 1748,

21 & 22 G. 2. *Price v. Griffiths*, where the same Point was twice discussed, both at the Bar and on the Bench; but it was left, at last, undetermined. Sir John Strange there attested, that the Court were apprized of the Rule he made absolute in *Tindale v. Gwynne*.

not

* Noble v.
Tindall, M.
24 G. 2.
Whitmore v.
Gardiner, P
M. 22 G. 2.

not have made such a Rule absolute, if they had thought it a wrong one. And * Six or Seven Cases were cited by Mr. Price, to prove "that was the constant Practice in the Court of Exchequer."

4 G. 2. Clark v. Philips, M. 8 G. 2. Perry v. Pease, Tr. 13 G. 2. Stent v. Owen, M. 22 G. 2. Stent v. Angel, M. 22 G. 2.

A RULE was therefore granted, to SHEW CAUSE why this Venue should not be changed from *Middlesex* to *Denbighshire*.

Lord MANSFIELD said he did not *at first* see why the Court should refuse to change it into the next *English* County; as the *same Reasons* seemed to hold for doing that, as for changing it from one *English* County into another *English* County. But Mr. Justice Denison had satisfied him that there was a *good Reason* for refusing it: Which is, that the *Form of the Affidavit* is so religiously settled, that it can not be departed from; and in the Case of changing it to the next *English* County, they can not swear in *that Form* which is *essentially requisite* on such Motions; namely, "That the Cause of Action AROSE IN *the County* into which it is prayed to change the Venue; and *not elsewhere*, out of the said County," (where it was originally laid.)

On *Thursday* the 1st of this present Month of *June*, Mr. Kenyon moved to make the Rule absolute, upon an Affidavit of Service.

And there being *no* Defence—

The RULE was made ABSOLUTE.

Rex *versus* Dr. Petteward et al. Justices of Peace for Surry.

ON *Tuesday* 31st of *January* last, Sir Fletcher Norton and Mr. Cox shewed Cause against a Mandamus, to be directed to the said Justices of Peace, commanding them to appoint Surveyors of the Highway for the Parish of *Battersea*, out of a List returned to them on the Part of the Parish; all of whom they had rejected, and had appointed another Person *not named* in the said List.

The Cause they shewed was, that the List returned to the Justices was *not a regular List*, agreeable to the Directions of the late Act of Parliament of 7 G. 3. c. 42. sect. 1. Nor was the Assembly holden on the 22d of *September* 1768, who made this List, and returned it to the Justices, *regularly holden*; several of the necessary Parish Officers not being present.

I

1st. There

1st. There was *no Churchwarden* present, *no Tithingman*, *no Headborough*, *no Constable*: Whereas the Act directs, “that upon
“ 22d September in every Year, (unless that Day shall be *Sunday*,
“ and then on the Day following,) the *Constables*, *Headboroughs*,
“ *Tithingmen*, *Churchwardens*, Surveyor or Surveyors of the
“ Highways, and Householders, being assessed to any parochial
“ or public Rate, shall assemble together at the Church &c; and
“ the major Part of them so assembled, shall make a List &c.”

2dly. It had *Marks of Fraud* upon it: For, it was *intituled* as if all these Persons *had* been present.

3dly. It was made at a riotous Assembly of the lower Sort of People; and consisted of improper Persons.

They offered Affidavits in Proof of their Allegations. But

LORD MANSFIELD and Mr. Justice YATES said—We can't determine this, upon *Motion*: The other Side have no Opportunity of controverting these Affidavits. It is upon a *new Act* of Parliament. The Justices must make a *Return*.

The RULE was made absolute, for a MANDAMUS.

To this Mandamus the Justices returned the first Objection abovementioned. Upon which, a Motion was made for an Information against them for a false Return: And a Rule “to shew Cause” was granted upon that Motion.

On shewing Cause, now, against such Information,

The Question intended to be brought before the Court was—
“Whether it was *essentially requisite*, that *some* Person or Persons of *each* Body particularly specified in the Act of Parliament, (Constables, Headboroughs, Tithingmen, Churchwardens, Surveyors, and Householders,) should be present at the Parish Meeting appointed for naming Persons to be returned to the Justices:” Or, in other Words, “Whether the Constables, Headboroughs, Tithingmen, Churchwardens, Surveyors, and Householders, were made CONSTITUENT Parts of such Assembly, so that some of each Body must necessarily be present, as being of the *Quorum*.”

The COURT had great Difficulty, how to come at this Question in the Situation of the present Case.

They thought proper to discharge the present Rule.

But they seemed to incline very strongly, that the Legislature only meant it to be a full parochial Meeting, *without* intending that Each of these Bodies should be such *essential* constituent Parts of it, that their Acts would be annulled and made void by the Absence of the Churchwardens, or of the Constables, or Headboroughs, or Tithingmen, or other respective Denomination.

Mr. Justice ASTON observed, that a Constable might perhaps *die* just before the Meeting; or might absent himself *on Purpose* to frustrate the Effects of the Meeting: And it was not probable that the Legislature meant that such Absence should render the Acts of the Meeting null and void.

Tuesday 13th
June 1769.

Taswell *versus* Stone.

THIS was an Action of Debt on a former Judgment: And Judgment was signed in the present Action, for want of a Plea.

Mr. *Wallace*, on behalf of the Plaintiff, shewed Cause against a Rule which had been obtained by Mr. *Mansfield*, for the Plaintiff to shew Cause why the Judgment signed in this present Action should not be set aside; and further Proceedings in this latter Action stayed, until the Determination of the Writ of Error now depending upon the *former* Judgment upon which this latter Action is brought.

There was an Affidavit on the Part of the Defendant, “ That
“ the Plaintiff did, in *Trinity* Vacation last, bring his Action
“ against the Defendant; and obtained Judgment against him.
“ That the Defendant thereupon brought a Writ of Error, and
“ hath transcribed &c: And it still remains *undetermined*. That
“ Two or Three Days before this present *Trinity* Term, the De-
“ fendant was served with a Copy of a Bill of *Middlesex*, in a
“ Plea of *Debt on the said Judgment* obtained against him as
“ aforesaid: And on the first Day of this present *Trinity* Term,
“ the Plaintiff caused to be filed a Declaration *de bene esse*, in the
“ latter Action, against the Defendant, and hath *signed Judgment*
“ against him for want of a Plea; although the said Proceedings
“ in Error have been regular, and are not yet determined.”

Mr. *Wallace* urged, that there was no Pretence for *setting aside* this latter Judgment: And the Defendant came too late, even to *stay Proceedings* upon it; because *Execution* was gone out upon it, and the Sheriff is actually in *Possession* upon this Execution.

The

The COURT were clear, that there was no Reason to *set aside* this latter Judgment: But, on the other Hand, it was highly proper to *stay Proceedings* upon it; as it would be unreasonable that the Plaintiff should proceed in *executing* a Judgment which would of Course fall to the Ground, in case the original Judgment, upon which it was founded, should be *reversed*.

Mr. *Wallace* then prayed, that the Defendant might be *restrained* from bringing a Bill in Equity.

THE COURT thought this reasonable: And Mr. *Mansfield* consented to it.

Bertie versus Pickering et Ux'.

THIS was an Action of Trespass. One of the Counts was "for taking Goods," generally; *without specifying the Particulars*. A general Verdict had been found for the Plaintiff; and One Penny Damages.

On Saturday the 15th of *April* last, Mr. *Lucas* moved in Arrest of Judgment, upon the Authority of *Wyat v. Effington*, in 1 *Strange* 637*: And had a Rule to shew Cause.

* Vide 2 *Ld.*
Raym. 1410.
S. C.

Mr. Serjeant *Burland* and Mr. *Barnes* now shewed Cause.

There is a Distinction between *Trover* and *Trespass*. 2 *Strange* 1094. *Smalley v. Kerfoot et Ux'*: And more fully, in *Andrews*, 242 to 247. S. C.

And here the Particulars are specified in *other* Counts in the Declaration. After a Verdict, if the *Value* be not set forth in the Declaration, it is nevertheless good. It would be good in an Action for Goods sold and delivered. The same Reason would hold there, as in *Trespass*.

They are too late with their Motion in Arrest of Judgment. They might have taken Advantage of it on their Demurrer: But that they have withdrawn. 1 *Strange* 425. *Edwards v. Blunt*. However, the Declaration is certain enough. 1 *Inst.* 303.

There is a Difference, where a *specific Thing* is to be recovered; and where *Damages* only are to be recovered, and not the Thing itself. For which Distinction, they cited 1 *Lev.* 303. *Jenny v. Norris*. They also cited *Cro. Jac.* 664. *Bancroft v. Coo*; and *Cro. Jac.* 435. *Johns v. Wilson*.

LORD MANSFIELD—I am thoroughly satisfied with the Reason why in an Action of Trespas for Goods taken away, the Particulars ought to be specified: For, how can the Defendant justify, unless the Goods are specified? How can he justify taking *divers* Goods?

The Reason
given in 2d
Lord Raym.

1410. is “that the Recovery could not be pleaded in Bar of *another* Action brought for the same Goods.”
In Stra. 637, no Reason at all is given.

The *true* * Reason is, “That the Defendant can not justify, unless the Particulars are specified.”

Mr. Justice YATES concurred in this as the *true* * Reason.—
This is a *general* Verdict: And therefore if one Count is bad, the Judgment must be arrested.

Per CUR’.

JUDGMENT ARRESTED.

Rex *versus* Inhabitants of Clace in the County of Glamorgan:

Or, Rex *versus* Lewis and Seven Others.

ON Monday the 5th of this Month, Mr. *Ashburst*, on behalf of the Defendants, moved for a *PROCEDENDO* to a *Certiorari* to the Quarter Sessions of the Peace for the County of *Glamorgan* in *Wales*, “to remove an Indictment from thence into this Court:” For that an Indictment ought not to be removed up hither, in the *first* Instance; there being a Court of *Grand Sessions* there. They can not come hither *per Saltum*. The Indictment was for not repairing a Highway, which it charged the Defendants to be bound, *ratione tenuræ*, to do.

* Vide ante,
vol. 2. p. 749.
8th Feb.
1759.

He cited *Rex v. Gwynne* * *et al’*; *Hil.* 32 G. 2. in this Court.

RULE to shew CAUSE.

Mr. *Poole*, on behalf of the Prosecutor, now shewed Cause against the Issuing of a *Procedendo*.

He cited *Hawk. P. C. lib. 2. p. 287. § 25, 27, 28.* to shew, that the Prosecutor has a *Right* (though perhaps the Defendant may not,) to a *Certiorari* to remove any Indictment taken in *Wales*, for a Crime *not Capital*; either at the *Grand Sessions*, or at a *Sessions of the Peace*.

The

The Case of *Cardiffe Bridge*, in 1 Lord Raym. 580. and 1 Salk. 146. is an exprefs Determination in Point “ that a Certiorari “ *does lie to the Justices of Peace in Wales*, passing over the “ Grand Sessions *per Saltum*; and that it is the constant Practice “ to grant them.”

This Certiorari is *filed*; and the Defendants have *not appeared*: Therefore they can not apply for a *Procedendo*. It is a Certiorari at the Instance of the *Prosecutor*. The Defendants can not apply to send it back, without assigning a special Reason. Here, no special Ground is assigned: And there are only Three Defendants, out of Seven, who apply for it.

Mr. *Dunning* and Mr. *Ashburst*, *contra*, for the Defendants, argued that the Court's granting a *Procedendo*, in such a Case as this, is *discretionary*. It is *not of Course*, for the Prosecutor to remove Indictments out of *Wales*, though not Capital. The Court will refuse it to him, when equal Justice can be done below.

2 *Hawk. P. C.* 287. “ That the Court is bound to award it at “ the Instance of the *King*,” only relates to the *Crown*, when the King applies by his *Attorney-General*. The Officer of the Crown, prosecuting *for the Crown* has indeed such a Privilege: But not a *common* Prosecutor of an Indictment.

In a Note at the End of *Draiton and Cotterill v. Smith*, 2 *Bulstr.* 158. It was said by *Coke* Chief Justice, and agreed by the whole Court, that the Court have *Power* to remove Records from *Durham*: But they will not do it; “ *because they have Law* “ and Pleadings *there*, as this Court has *here*.” The same Reason holds here. The Grand Sessions in *Wales* have the same Power in *Wales*, as this Court has here:* They ought to have gone *thither* first. They can not come hither *per Saltum*, without laying a special Ground. Whereas this Indictment came hither *as of Course*: And there is Nothing particular in the Case. 'Tis a simple Indictment for not repairing a Highway: And the Certiorari to remove it hither would not have been granted, if the Court had been apprized what it was. This Removal up to this Court is oppressive and vexatious: For, it might just as well be tried in *Wales*, either at the Quarter Sessions, or at the *Grand Sessions*, as here.

* Vide 27 H.
8. c. 26. and
34 & 35 H.
8. c. 20.

As to the Return to the Certiorari being *filed*; and our not having *appeared* to the Indictment—We could not hinder their *filing*. They could do that, without our having an Opportunity to object to it: It is of Course. And the Reason we did not appear to

the Indictment, was the Apprehension of our being thereby precluded from making this Motion.

They desired to have it understood, that their Motion was not grounded on the Want of *Power* in this Court "to grant such a Certiorari," but upon the Ground of *Discretion*.

Lord MANSFIELD—This is a Certiorari to the Quarter Sessions of a *Welsh* County, to remove an Indictment against Eight or Nine Persons for not repairing a Highway; which it charges them with being bound to repair *ratione tenuræ*.

I believe there is a Distinction, (and it has been attended to lately,) between an Indictment only in the *Name* of the *Crown*, (as *all* Indictments *must* be;) and an Indictment actually prosecuted by the *Officer* of the *Crown*. In the *latter* Case, the King has undoubtedly a Right to prosecute in what Court he pleases. I remember a Case from *Bristol*,* where the Attorney-General, on behalf of the *Crown*, moved for a Certiorari to remove some Orders of two Justices made for the Relief of Glasmakers from an Over-Charge upon them by the Officers of Excise: And it was holden "That the *King* had a Right in *every* Case where "the *Crown* is concerned, to *demand* a Certiorari; and that "the Court are *bound* to grant it, unless the King's Right to it "is restrained by some Act of Parliament."

* The Name of it was The King against Onesiphorus Tindall and Others: And it was in Easter Term 1754. 27 G. 2. His Lordship was then himself Attorney-General, and made the Motion.

In the Case of *Richmond Park*,† I prayed a Certiorari, as *Attorney-General*, in the Name of the *Crown*: And, though I moved it on the Part of the *Defendant*, the Court were of Opinion "That the King's Attorney-General had a Right to *demand* it, when it appeared that the Right of the *Crown* was "in Question."

† The Name of this Case was The King against Deborah Burges: It was in the very same Easter Term 27 G. 2. He declared that he made the Motion by special Order from the King, (who was desirous that the Right should be solemnly tried.)

Therefore, in *such* Cases, the Court will exercise *no* Discretion.

But where the Matter is really prosecuted only by a *private* Person, (which private Person is under the Control of the Attorney-General, who may stop the Prosecution,) there is a Distinction.

In the Case of an Application on the Part of the Prosecutor, for a Certiorari; it goes of Course: In Cases of Application by the *Defendant*, there must be a *special Ground* laid, in order to remove it from *Wales*, or from *any* Jurisdiction whatsoever.

This Certiorari is moved for by the *Prosecutor*. What Ground is shewn "why he should not have it?" None.

This is not a Dispute between the Grand Sessions and this Court, about Jurisdiction.

Here are Eight or Nine Defendants concerned in a Question about repairing a Highway, *ratione tenuræ*. I don't know how many Cousins these Eight or Nine Defendants may have at the Quarter Sessions in *Wales*.

Mr. Justice YATES concurred.

The Crown has a Right, in general, to a Certiorari: And *no* sufficient Reason is shewn why the *Prosecutor* ought *not* to have it, in the Case now before the Court.

Besides, as this Certiorari is *filed*, the proper previous Motion to this Motion for a *Procedendo*, would have been "*to take the Certiorari off from the File*:" For, you can't move for a *Procedendo* whilst it is upon the File here.

But the *Prosecutor* has a Right to remove his Indictment, *unless* some Ground be laid before the Court, to the Contrary.

Mr. Justice ASTON—The *King* has a Right to choose his Court: But the Court will not remove Indictments from the GRAND Sessions at the Application of a * *Defendant*, without *Grounds*.

* In a Case of
Rex v. Owen
Parry and

Gainor Thomas, (never determined) where Mr. Justice Aston moved for a *Procedendo*, Mr. Justice Wilmot said (on Saturday 5th May 1759) that he had looked into the Case of Theodore Morris, reported in 1 Ventris 146, and 2 Keble 724, 729. And that it appeared by the Rule-Book, that the Certiorari did not issue at the Application of the *Defendant*, but at the Instance of the *Prosecutor*.

In the Case of *Berwick*, (*Rex v. Cowle*) a Case was cited of *Trin. 12 G. 1. B. R. Rex v. Lewis*; where the Defendant moved for a Certiorari to remove an Indictment for a Misdemeanour, from the Grand Sessions of *Anglesea*: And it was granted, upon producing an Affidavit, inducing a Suspicion "that a fair Trial " could not be had in *Wales*." [*Vide ante*, vol. 2. p. 861, 862. and 1 *Strange*, 704.]

In the Case of *Rex v. Berkeley and Bragg*, on the Glass Act*, in Lord Chief Justice Ryder's Time. The Court were clear in Opinion "that the Words in 2 *Hawk. P. C.* 287. *sect.* 27. related merely to the *Crown*."

* He meant
Rex v. One-
siphorum
Tindall et al'.
For, Nor-
borne Berke-
ley and
Charles Bragg
made that
Order.

The

The true Distinction is, that where the *Prosecutor* moves for it, it goes of Course : But the *Defendant* must shew a *special Ground*, to obtain it, or to remove the Record *back again* by *Procedendo*.

Mr. Justice WILLES was of the same Opinion with Lord *Mansfield* and the Two other Judges.

THE RULE “to shew Cause why there should not be a *Procedendo*,” was DISCHARGED.

Wednesday
14th June
1769.

Couch, qui tam &c, *versus* Jeffries.

THIS was an Action for the Penalty of not paying the Stamp-Duty upon an Indenture of Apprenticeship. Upon the Trial a Verdict was given for the Plaintiff.

+ 9 G. 3. c.
37. § 4.

On *Saturday* last, (the 10th Instant,) Mr. *Ashurst* moved on behalf of the Defendant, that the Plaintiff might shew Cause why he should not be restrained from entering up his Judgment ; The Defendant having, since the obtaining the Verdict in this Cause, and before the 1st of *September* 1769, paid the Duties upon the Sum omitted to be inserted in the Indentures of Apprenticeship, to the Stamp-Office, pursuant to an Act of the last Sessions†, which discharges Persons who have incurred any Penalties, by such Omissions, of and from the said Penalties, upon their paying the Duty on or before the 1st of *September* 1769.

RULE to shew CAUSE.

Mr. Serjeant *Davy* and Mr. *Mansfield* now shewed Cause. The Act says, “that if the Duty before neglected to be paid shall be “paid in on or before the 1st of *September* 1769; and the Indentures be tendered to be stampd, any Time before the 29th “of the same Month; the Person who has incurred the Penalty “by the Omission shall be discharged of and from the said Penalties.”

This Verdict was obtained, upon an Action brought and tried before the making of the Act.

The Question is, “Whether this Act shall relate to Actions “*commenced before* the first Day of the Sessions in which it “passed.”

They argued, that it did *not*. The Right is *vested* in the Plaintiff: The Act extends only to Actions *to be brought in future*.

ture. 2 Inst. 292. applies fully to the present Case: “*Nova Constitutio futuris formam imponere debet, non præteritis.*”

There was a Case soon after the Statute made for preventing of Frauds and Perjuries, * which enacts “that from and after 24 June 1677, no Action shall be brought whereby to charge any Person upon any Agreement made upon Consideration of Marriage, unless such Agreement, or some Memorandum or Note thereof, shall be in Writing, &c.” That Promise was made *before* the Day specified in the Act: The Action was not brought till *after* it. The Court held “That the Act could not have a Retrospect to take away an Action to which the Plaintiff was before entitled.” The Name of that Case was *Gilmore v. Shuter*: and it is reported in 2 Show. 16. 2 Mod. 310. 2 Lev. 227. 1 Ventr. 330. and *Sir Thomas Jones* 108. It was holden, “that the Statute extended only to Promises made after that 24th of June.”

* Vide 29 Car. 2. c. 3. § 4.

In the present Case, there was a Right vested by the Legislature; which vested Right shall not be taken away from an innocent Man, in Favour of an Offender.

An Act of Parliament shall never be so construed as to do an Injustice. *Sir Francis Barrington's Case*, 8 Rep. 136. b.

Note. Lord MANSFIELD put a Question, What was the Meaning of the Words inserted in a Parenthesis in this 4th Clause of the Act—“(of which timely Notice is to be given in the *London Gazette*)”?†

† The Words are “Upon

“Payment &c, and tendering the Indentures &c, to be stamped, at the same Time, or at any Time on or before 29th September 1769, (of which, timely Notice is to be given in the *London Gazette*,) the same Indentures &c. shall be good and available &c.”

Mr. *Ashurst*, on behalf of the Defendant, would have had it understood of Notice given by the Commissioners.

Mr. Justice YATES and the Two Other Judges seemed to come into that Construction.

But Lord MANSFIELD understood it of Notice given by the Delinquent. And Mr. Justice ASTON afterwards said, it meant public Notice, in order to make the Indenture capable of being given in Evidence.

Mr. *Ashurst*—The Commissioners of Stamp-Duties have published a Notice in the *Gazette*,‡ to all Persons who had omitted to pay the several Rates and Duties, “That upon Payment of the same on or before 1st September then next following, the Indenture

‡ See *Gazette*, No. 10912, from 23 to 27 May 1769, and the two following.

“ denture should be good and valid, and the Person offending be
 “ excused from any Penalty incurred by the Omission thereof.”

The Reason, he said, of inserting this Clause in the Act was because the Act related to so many different Subjects, that it might be easily overlooked, and remain unknown to many Persons. And so it has been understood at the Stamp-Office.

This Act has no Proviso to save Actions already commenced : And therefore it extends to such Actions. The Court will not *add* such a Proviso, when the Legislature have *omitted* it. The Words are very strong—“ That the Person paying the Duty &c, “ &c, shall be *acquitted and discharged of and from the said Penalties.*”

Gilmore's Case was plain and clear, upon the Words of *that* Act of Parliament of 29 C. 2.

And Sir *Francis Barrington's* Case is not, in it's Principles, contrary to my Construction.

We may take Advantage of this Matter *now*, as well as by a Plea after the last Continuance.

All the former Acts have had Provisoes in them, to save Actions already brought. As this has no such Proviso, they are not saved.

Lord MANSFIELD observed, that Mr. *Aspburst's* Argument would equally prove, “ That if Judgment had been signed “ upon this Verdict, and *Execution* taken out ; and the Duty afterwards paid in to the Stamp-Office, pursuant to the Directions of this Act ; the Money levied ought to be *refunded.*”

Here is a *Right vested* : And it is not to be imagined that the Legislature could *by general Words* mean to take it away from the Person in whom it was so *legally vested*, and who had been at a great Deal of Cost and Charge in prosecuting. They certainly meant *future* Actions. Otherwise, it would be punishing the Innocent instead of the Guilty. It can never be the true Construction of this Act ; to take away this vested Right, and punish the innocent Pursuer of it with *Costs*.

Mr. Justice YATES clearly concurred with Lord MANSFIELD.

The Title of the Act is—“ for allowing further Time for paying Duties omitted to be paid upon Contracts with Clerks and “ Apprentices ;” And the Words of this Clause are—“ that the “ Persons

“ Persons who have incurred any Penalties by the Omissions
“ aforefaid, shall be acquitted and discharged of and from the
“ faid Penalties.”

The Payment ought to be made, *fo that* it can be given in evidence *at the Trial*. It was meant to bar all *future* Actions to be commenced *after* the Duty had been *paid* pursuant to this Act; and upon the Trial whereof, such Payment could be given in Evidence. But it would be very strange, if we should make a Construction with a Retrospect, to *punish* an innocent Man, in *Favour* of an *Offender*.

I am of Opinion, that the Defendant could not have helped himself by a Plea after the last Continuance. For, the Act of Parliament means that the omitted Duty should be paid, *fo that* the Payment of it may be *given in Evidence* at the *Trial* of the Cause.

Mr. Justice ASTON and Mr. Justice WILLES concurred. They repeated and adopted the Reasons already rehearsed; and were clearly of Opinion, that this Act of Parliament does *not* extend to Actions that had been brought prior to the making of it.

LORD MANSFIELD—Therefore the Verdict ought to stand; And the Rule must be discharged.

RULE DISCHARGED.

Michaelmas

Michaelmas Term

10 Geo. 3. B. R. 1769.

Tuesday 14th
Nov. 1769.

John Sibly *versus* Penhallow Cuming Esq.

THIS was an Action of Debt on the Statute of 2 G. 2. c. 24. intituled "An Act for the more effectual preventing Bribery and Corruption in the Elections of Members to serve in Parliament:" And the Defendant pleaded "*Nil debet.*"

It was tried at the last Assizes holden at *Bodmin*, for the County of *Cornwall*: When a Verdict was found for the Plaintiff, on the 5th, 7th, 9th, 11th and 13th Counts, in the Penalties of 2500*l.* subject to the Opinion of the Court on the following Case.

CASE—The Defendant proved a Copy of a *Judgment* in the Court of Common Pleas, of *Hilary* Term 9 Geo. 3. between the said *Penhallow Cuming* Esq. Plaintiff, and the said *John Sibly*, Defendant: By which, it appears "that the Defendant was convicted for bribing *Richard Beard* and *John Crews*." He also proved a *Capias ad respondendum*, issued in the same Cause on the 20th of *December* 1768, tested 28th *November* 1768.

The said *Richard Beard* gave Evidence, That he was a Witness for the Plaintiff in the said Cause *Cuming against Sibly*; and proved at the Trial, "that *Sibly* gave him Three Guineas for his Vote;" and further gave Evidence, in this Cause, "that said *Cuming's* Servant came to him in *January* last, and desired him to come to his Master's House: That before the said Time, he had made no Discovery of the Bribery. That Mr. *Philips*, an Attorney, examined him about it; and he made an Affidavit of the said Bribery: But he did not then see Mr. *Cuming*."

Nicolas Philips gave Evidence, "that he was a Commissioner for taking Affidavits, both in the Court of Common Pleas and King's Bench. That in *January* last, he received a Letter from

“ Mr. *Cuming*, desiring him to come to his House: And he
 “ went, accordingly. That Mr. *Cuming* then desired him to
 “ take the *Affidavits* of several Persons, and (amongst the Rest)
 “ of said *Richard Beard* and *John Crews*, with regard to the Bri-
 “ bery-Money distributed by *Sibly* to the Voters of *Tregony* at
 “ the last Election. That he accordingly took the said *Affidavits*,
 “ for the Purpose, as he believes, of settling the Declaration in
 “ the said Cause, *Cuming* against *Sibly*.”

QUESTION—“ Whether CUMING is a DISCOVERER, under
 “ the Act of Parliament; so as to be discharged from the
 “ Penalties and Disabilities incurred by the Offences men-
 “ tioned in the Declaration in this Cause?”

Mr. *Serjeant Burland*, on behalf of the Plaintiff; objected—1st,
 That this Matter ought not to have been admitted to be given in
Evidence: It ought to have been *pleaded*. 2dly, That the De-
 fendant was *not* the Discoverer.

First—This Demand being grounded on an Act of Parliament;
 and an *Excuse* made in *Discharge* of the Demand; it ought to
 have been specially set forth in *Pleading*; that the Court might
 judge of it. *Co. Litt.* 282. *Hob.* 296.

It is not proper for the *Jury* to judge of; especially, when it
 is Matter of *Record*.

In *Co. Litt.* 303. The Distinction is taken between Matter of
Substance, and Matter of *Inducement*; as to the Manner of al-
 ledging and answering it. Special and substantial Matter must
 be specially answered.

And the Case of *Waites v. Briggs*, in 2 *Salk.* 565, recognizes
 that Distinction. [See also 5 *Mod.* 8, 9. S. C.]

Upon *Nil debet*, any Thing may be given in Evidence to shew
 that he was discharged of the Debt, unless it be a *collateral* Mat-
 ter. But here, it is a *collateral* Matter. And he compared it to
 the Case of a former Judgment and Recovery for the same
 Offence; which can not be given in Evidence, but must be
pleaded.

The Case of *Bredon, qui tam, v. Harman*, 1 *Strange* 701.
 where a Record of a former Recovery was denied to be received
 in Evidence, he said, was exactly similar to the present Case.
Eyre, Chief Justice, held, that it ought to have been pleaded:
 And then the Plaintiff might have replied “ *Nul tiel Record*,” or
 that it was obtained by Fraud. This Indemnity (which is a *col-*

lateral Matter of Record) ought for the same Reason, to have been pleaded.

* Vide ante,
2283.

† In C. B.
Temp. Ld.
Ch. J. Willes;
tried before
Mr. Baron
Smythe.

This Case differs from the Case of *Sutton v. Bishop**, and from *Gardiner v. Horne*†. For, in those Cases, the Indemnity *could not* have been pleaded: But here, the Indemnity is *completed by Judgment* before the Action was brought.

This Method of giving it in Evidence would be an Evasion of the Statute of 4 Ann. c. 16. § 7. which excepts Penal Statutes. So, on 21 J. 1. c. 4. there would have been no Need of the Exceptions in the fifth Section of it. This Act has been construed to extend only to former Acts of Parliament, and not to subsequent Ones: Therefore I only use it as an Argument "That *before that Act, it must have been pleaded.*"

He concluded this First Point with observing that a Plea of *Nil debet* differs from the general Issue of *Non assumpsit*: In which Case, any Thing that shews a Discharge from the Demand may be given in Evidence.

SECOND POINT—Whether (even supposing that it might be given in Evidence) this Evidence shews "That *Cuming was the Discoverer.*"

It is not such *conclusive* Evidence, as to preclude the Jury from exercising their Judgment "Whether he was or was not the *Discoverer.*"

There can not be *two* first Discoverers of the same Offence.

It depends upon the Circumstances; "Which of these Two *was the Discoverer;*" *Cuming*, the Plaintiff, in that Action; or *Beard*, the Witness.

Here, the Affidavit was made, to found the Declaration upon. And the Discovery had *not* been made *before Beard's* Affidavit: Therefore he must have been the first Discoverer.

Though *Cuming* sent his Servant for *Beard*, it does not follow from thence "That *Cuming was the Discoverer.*"

Therefore he prayed that the *Postea* might be delivered to the Plaintiff.

Mr. *Mansfield*, *contra*, for the Defendant, argued—1st, That the Defendant *was at Liberty* to give this Evidence upon the
Plea

Plea of *Nil debet* : And 2dly, That the Evidence proves the Defendant to be the Discoverer.

FIRST—He agreed to the Serjeant's Principles, " That where
" the Defendant would introduce into his Defence any collateral
" Matter which does not deny the Charge in the Declaration,
" he must plead it."

The Declaration will always shew what the Defendant may give in Evidence upon the general Issue.

The Judges have been more liberal, of late Years, in admitting Matters to be given in Evidence on *Non assumpsit*. But the old Rules were the same, in *Non assumpsit* and on *Nil debet*. 2 *Roll's Abr.* 682, 683. Title " Trial," Evidence E. F.

This does not depend upon the old Rules of Pleading only : For, the Act of 21 *J. 1. c. 4.* extends to Actions upon *subsequent Statutes*. [Which Lord MANSFIELD denied.] The Point, he said, was not before the Court, in the Two Cases (of *Gaul* and *Hicks*) in 1 *Salk.* 372 and 373 ; and 2 *Hawk. P. C.* 270, 278. considers the Words of that Statute as general Words : And they are so. And as to *Actions upon Penal Statutes*, it is held as an invariable Rule " That they must be brought in the particular " County : " And if they are not, that it may be given in Evidence on *Nil debet*. Now that can be founded on no other Law than the Statute of 21 *J. 1. c. 4.* And if the Statute extends to subsequent Statutes as to that *one* Case, it must do so, as to all others.

As to 4 *Ann, c. 16.*—It would follow from the Serjeant's Argument, " That in Civil Cases, a Man should take Advantage " of pleading many Matters ; and in Penal Cases, be confined to " One only." But see 2 *Roll's Abr.* 682. and many other Books ; and *Bro.* " General Issue," *pl.* 14.

Another Act, 31 *Eliz. c. 5.* limits common Informers to sue within a Year. On *Nil debet* pleaded, the Defendant may give in Evidence, a Discharge by Lapse of Time ; *viz.* that the Matter arose above a Year before the Action brought.

In the Case of *Gardiner v. Horne*, there were two cross Actions for Bribery. *A.* succeeded in the First : On the Second, he would have given in Evidence that Recovery, to prove him a Discoverer. Mr. Baron *Smythe* held " that he might : " And the Court of Common Pleas were of the same Opinion.

SECOND

SECOND POINT—Upon this Evidence, Mr. *Cuming* is the Discoverer, and intitled to a Discharge.

As to the Evidence being *conclusive* upon the Jury—These stated Facts are to be considered as Facts *found* by the Jury, upon a special Verdict.

Mr. *Cuming* has made the Discovery; and has prosecuted to Judgment and Execution. A *Witness* may have been an involuntary One; and not have wished to convict: But the *Prosecutor* certainly wished to convict. It was not necessary to state *why* Mr. *Cuming* sent for *Beard*: But here it appears that it was in order to convict *Sibly*. The Time of bringing the Action shews that Mr. *Cuming* was the Discoverer: And no other Discoverer is stated upon the Case.

Mr. Serjeant *Burland*, in Reply.

As to the first Point—The Declaration does not sufficiently shew what the Plea must be.

“*Nil debet*,” denies the Plaintiff’s Demand: But it does not shew that it was discharged by a collateral Matter. Nor can such a Discharge be given in Evidence.

The Act of 21 J. 1. c. 4. does not extend to Offences since created, nor to Actions given by subsequent Statutes. 1 *Salk.* 372. *Rex v. Gaul*; and S. C. in 12 *Mod.* 223. *The King v. Gall.* 1 *Salk.* 373. *Hicks’s Case*; and 5 *Mod.* 425.* And all the Clauses of it are within the same Rule and Reason.

* It is there styled “*Anonymus*.” But it is, most manifestly, *Hicks’s Case*.

The Reason of laying the Action in the County where the Matter arises, is because they are local Actions, and the *Venue* must come from the Hundred. Therefore the Judges have holden, that popular Actions must be brought in the County.

Where the Act of Parliament fixes a particular Time, the Defendant may give the Discharge in Evidence; because he is not liable to a Prosecution under that Act; he is not the Object of the Act: But here, he is the Object of the Act, unless discharged by the collateral Matter.

As to the Case of *Gardiner v. Horne*—The Defendant could not plead it, at the Time. Here, the Judgment is complete: And there was no Impediment against pleading it.

In the *Reading Cases*, The Recovery was pleaded as *puis dar-reine Continuance*.

As to the SECOND POINT—This Witness was not unwillingly drawn in to give the Evidence: He *voluntarily* made the Affidavit.

The Writ which the Plaintiff brought was only a *Quare clausum fregit*: Upon which, the Plaintiff might have declared for any other Matter. Therefore it was not the Commencement of this Suit, in particular; but only of a Suit, in general.

LORD MANSFIELD—I give no Opinion now, on the *first* Point. But on the *Second*—It does not follow that the Prosecutor must be the Discoverer: He sets up another Person to bring the Action. The Act of Parliament meant to turn the Actors of Bribery against each other. The Man that *tells* it, is the Discoverer: The Plaintiff in the Action brought in the Common Pleas by *Cuming v. Sibly*, was only the Person who *advised* or persuaded the other to discover.

In the Case of *Sutton v. Bishop*, the * *Witness (Bishop)* was the Discoverer. So here, *Beard* was the Discoverer. * Vide ante, p. 2284, 2286.

But if be considered as doubtful upon the Evidence, “Who was the Discoverer;” the Jury have found it against *Cuming*.

Mr. Justice YATES, as to the *first* Point, gave no determinate Opinion. Yet he inclined to think with Mr. *Mansfield*; though he professed to give only his *present* Sentiments.

He was not satisfied that this was Matter of Substance, necessary to be specially pleaded. It seemed to him rather Matter of Inducement. And where it is Matter of Inducement, it may be given in Evidence, upon the general Issue; though not where it is Matter of Substance. Now this seemed, he said, to be more of the Nature of Inducement. He thought, the Defendant was no Object of this Law.

He said, a *Proviso* in the *same* Act of Parliament, and the Matter provided in it, may be given in Evidence, on the general Issue.

And he specified the Case of an Action against a Parson for merchandizing, contrary to 21 H. 8. c. 13. which has a *Proviso* for the Necessaries to maintain his Household.

Now here is a *Proviso* in this Act of 2 G. 2. which, in Effect, says That a Person who has been a Discoverer shall not be an Object of this Law.† The Defendant has pleaded “*Nil debet.*” † Vide sect. 7. and vide ante, p. 2284. the very Words of it.

‡ Vide ante,
p. 2286.

The Judgment will *relate back* † to the Time of the Discovery. The Defendant maintains the Issue, by shewing that he does not owe the Money. I think, the Discoverer is not an Object of the Act.

As to the SECOND POINT—He held that the Defendant can not *here* be considered as the *Discoverer*. He has indeed shewn “That he was *not*; but that *Beard* was: For, he could not “have *known* what the Fact was, *unless* BEARD *had discovered it*.”

Mr. Justice ASTON—If it had been a *distinct* Act of Parliament, it ought to have been pleaded: But here is a *substantive* Clause (in Nature indeed of a Proviso) for Indemnity, in the *same* Act of Parliament. And if this had been pleaded, it would not have been sufficient: For, it would not have appeared upon the Plea, “That he was the Discoverer.”

BEARD was clearly the Discoverer: And *he* was the Person intitled to the Exemption. Therefore the Plea would not have been sufficient; because it would not have shewn that the Defendant was thereby exempted.

Mr. Justice WILLES, who tried the Cause, attested that the Case meant to consider the Facts, in the same Manner as if they had been specially found.

He gave no Opinion upon the first Point.

As to the Second, he was clear in concurring with the Rest of the Court.

BEARD was certainly the *first* Discoverer; and ought to have the Benefit of it. The Defendant is not intitled to the Benefit of the Exemption.

LORD MANSFIELD now said (upon the first Point) that he thought this Matter *might* be given in Evidence.

Per CUR’.

POSTEA to be delivered to the PLAINTIFF.

Davy *versus* Baker.Monday 20th
Nov. 1769.

THIS was an Action upon the Statute of 2 G. 2. c. 24. for the more effectual preventing Bribery and Corruption in the Election of Members to serve in Parliament: The 7th Section whereof enacts that if any Person shall ask receive or take any Money or other Reward, he shall forfeit 500*l.* and be disabled to vote at any Election.

This was at an Election for *Bramber* in *Suffex*.

Upon *Nil debet* being pleaded, a Verdict was found for the Plaintiff.

On *Tuesday* the 7th of this Month, Mr. *Wallace* moved in Arrest of Judgment. His Objection was that the Charge was too loose and general: It is only "that the Defendant did receive a *Gift or Reward*;" without specifying *what* he received or took, as a Reward; whether *Money*, or what *particular Species* of Reward.

Mr. *Dunning*, Mr. Serjeant *Leigh* and Mr. *Davenport* now shewed Cause, on behalf of the Plaintiff. They said that this, though general, was sufficient *after a Verdict*; whatever it might have been upon a Demurrer for a special Cause: For, a Pleading which upon Demurrer would be bad, for its being too general, may nevertheless be sufficient after a Verdict. And so was the Case in 1 *Mod.* 70. *Caterall v. Marshall.* 2 *Keb.* 692. S. C.

The Declaration is in the *very Words* of the Act of Parliament. And the Charge is found by the Jury to be true, "That he did receive a Gift or Reward;" and is therefore within the Act.

Mr. *Wallace contra.* All that the Declaration says is—"that he took a Gift or Reward, to give his Vote:" Which is in the Disjunctive. *Co. Litt.* 303. and *Long's Case*, 5 *Co.* 120.

The Defendant could have no Notice, to make his Defence.

He likewise cited 2 *Strange* 999. *Rex v. Robe*: Where the Judgment was arrested, because the Charge was so *general*, that it was impossible any Man could prepare to defend himself upon that Prosecution, or have the Benefit of pleading it in Bar to any other.

Lord

LORD MANSFIELD—This Declaration is bad: And being upon a Criminal Charge, It ought to have been laid with Certainty. The being after a Verdict makes no Difference. It may be taken Advantage of, in Arrest of Judgment: It is not too late.

MR. JUSTICE YATES—The Declaration is clearly bad. It ought to have been laid with sufficient Certainty, so as to be pleadable in Bar of another Action. Criminal Charges must be laid with Certainty: And if they are not, Exception may be taken, in Arrest of Judgment, after a Verdict. The Case of Extortion, cited by Mr. *Wallace*, is in Point.

MR. JUSTICE ASTON and MR. JUSTICE WILLES were silent.

JUDGMENT ARRESTED.

Tuesday 21st
Nov. 1769.

Vertue versus Lord Clive.

THIS was a Case of the same Kind with that of Captain *Parker* against Lord *Clive*, in *Easter* Term last; reported *ante*, p. 2419. The Difference between the two Cases was only this. Captain *Parker's* turned upon the *general* abstract Question, “Whether
“ a Military Officer in the Service of the *East-India* Company
“ has a Right to resign his Commission at all Times and under
“ any Circumstances, whenever he pleases:” The present Case turned upon the *particular Circumstances* under which Captain *Vertue* stood, at the Time when he resigned his Commission.

It came before the Court, upon a Motion for a new Trial in an Action for an Assault and false Imprisonment in *India*; in which, the Jury had found for the Defendant.

MR. *Dunning* (Solicitor-General) argued on behalf of the Plaintiff Mr. *Vertue*, for a new Trial.

He denied that Mr. *Vertue* was in a *Military* Character, or in a Capacity to commit a *Military* Offence, at the Time when this Military Jurisdiction was exercised upon him by the Defendant.

The Commission which Mr. *Vertue* had received contained no Engagement or Obligation upon the Company, to keep him in their Service a Moment longer than *they* liked; nor upon him, to continue in their Service longer than *he* liked: *Either* party were at their Liberty to put an End to the Contract, under *proper* Circumstances and in a *proper* Situation. And these were proper

proper Circumstances, and a proper Situation. The Reduction of the Batta, which had been allowed to the Predecessors of these Officers, took away from them what induced them to enter into the Company's Service: And the Enemy had been defeated, before the Plaintiff resigned his Commission. The Question depends, therefore, upon the *actual* Circumstances the Plaintiff was under at the Time of his Resignation.

Their common Soldiers stipulate for Five Years certain. Their Officers did not, at that Time, stipulate for any limited Time: And therefore, as the Company could at *any* Time turn off their Officers, They on the other Hand ought to be at Liberty to quit at *any* Time, under *proper* Circumstances.

The Company were used to *advance* a Month's Pay. The Officer could not, therefore, quit *within* that Month. But at the *End* of it, he was just in the same Case as the common Soldier was at the End of his Five Years. Now Captain *Vertue* had *not* received, but on the contrary *declined* to receive the Month's Pay in Advance: And therefore he could be under no Engagement or Obligation to continue in their Service, upon *that* Account.

If he had a *Right to resign*, it is quite immaterial whether Colonel *Smith* *accepted*, or *refused* to accept his Resignation.

And Captain *Vertue* acted by or for himself, upon his own Grounds and Reasons; not in Concert or *Combination* with any other Person.

He quitted the Camp upon the 8th of *May*; unconnected with any other Person, and upon a recent personal Affront. He was neither concerned in or even charged with being concerned in any *Combination* with any other Person whomsoever.

At the *Time* when he quitted the Camp, he was not under the Command of Colonel *Smith*: And therefore he could not be affected by Colonel *Smith's* forbidding him to quit it.

He was *improperly* brought before the *Military Jurisdiction*.

Mr. *Cox* and Mr. *Walker* were on the same Side; but left it upon what Mr. *Dunning* had urged:

Mr. *Thurlow* was beginning to speak on the Side of the Defendant, and in Support of the Verdict: But he was stopt by Lord MANSFIELD, who told him it was unnecessary for him to proceed.

HIS LORDSHIP, who tried the Cause, then gave the following Account of the Trial and Evidence.

This is an Action brought against Lord *Clive*, who approved the Sentence of the Court Martial; but was not privy to any Thing previous to the Court Martial, or to any Thing done at it.

At the Trial, the Question was "Whether Mr. *Vertue* was "an Object of Military Law, at the Time of holding the Court Martial upon him."

If he was not, every Thing done at it, in Relation to him, was void; and Lord *Clive* had no Right to hold it upon him.

* Vide ante,
p. 2421.

There were other Actions brought against Lord *Clive*. In that which was brought by Captain *Parker*, the Court were of Opinion "that these Officers had * *not* a Right to resign at *all* Times "and under *any* Circumstances, *whenever they pleased*." They very rightly guarded against laying down the *absolute* Proposition. The Right to resign must depend upon the particular Circumstances of each particular Case. The Question in Captain *Parker's* Case is not the Question in *this* Case: Captain *Parker* was tried for Mutiny *in* the Service. All arises from the Nature of the Service. There is no Engagement or Contract with the Officers, for any particular limited Time. The only Question at this Trial was "Whether Mr. *Vertue*, the present Plaintiff, was *in* his "Military Capacity, at the *Time* when he disobeyed Colonel "Smith's Orders and quitted the Camp."

When Lord *Clive* was in *India* before, the Officers had *double Batta*. The Company were dissatisfied with the Continuation of double Batta; and sent Orders to *India*, against continuing it: But Mr. *Vanfittart* did not think it seasonable at *that* Time, to reduce it. The Company afterwards peremptorily ordered it to be reduced to a single Batta. Lord *Clive* put their peremptory Order into peremptory Execution. The Officers under the Degree of Field-Officers, were dissatisfied at this Reduction. The Black Troops (the *Seapoys*) were commanded by *European* Officers. The *Marattas* were then in Motion: Some said, they were only collecting their Taxes; others supposed them to be dangerous. The Company's Troops were in three Brigades. The Officers of each Brigade *combined* together, to throw up their Commissions; and All of them, above 200 in Number, to resign at the same Time. The Plaintiff Mr. *Vertue*, a Lieutenant of *Seapoys*, was *One* of those who thus *combined*. Many of the Subaltern Officers, of whom the Plaintiff was one, wrote Letters,

ters, on the 6th of *May*, to Colonel *Smith*, desiring *Liberty to resign at the End of their Month*. He issued a very severe Re-
sentment of their Behaviour. Others, who desired Leave to *re-
sign immediately*, were ordered by Colonel *Smith*, to *Calcutta*:
And he declared that the Rest should have an Answer before the
End of the Month.

If they were used ill by Colonel *Smith*, *That* would not justify
them in *resigning*: They should have complained to the President
and Council.

Lieutenant *Vertue* was not affected by Colonel *Smith*'s sending
the Subaltern Officers who desired Leave to resign *immediately*, to
Calcutta. Yet, on the 7th of *May*, he went to Colonel *Smith*,
and complained of the Orders, and offered to resign. Colonel
Smith refused to accept his Resignation; and commanded him to
stay in the Camp. *Vertue* left his Commission upon Colonel
Smith's Table; and, the next Morning, went away from the
Camp, in the Sight of the Commanding Officers and of the Men
under Arms. Whereupon, Colonel *Smith* ordered him to be
arrested: And he was arrested accordingly; and afterwards tried
by a Court Martial, and ignominiously broken.

The Question I left to the Jury, was, "Whether under these
" Circumstances, he had a Right to quit the Camp, as being
" *then out of his Military Capacity*."

There was no Evidence that Colonel *Smith* had any Right to
take the Resignation of the Subaltern Officers: And he had re-
fused to take it; saying "that he would give an Answer before
" the End of the Month."

Lieutenant *Vertue* could not resign *before* the End of the
Month; because the advanced Month's Pay had been paid to the
Agent of these Troops, by the Paymaster, upon the 28th of *April*,
to be distributed amongst the Officers as usual; and there was
Evidence that Mr. *Vertue* was *mustered* on the 1st of *May*:
And on the 6th of *May*, he wrote a Letter to Colonel *Smith*,
signed as Lieutenant; and again another, on the 7th, *owning him-
self a Lieutenant*. Consequently, he was so, on the 8th in the
Morning.

But the great Ground is the COMBINATION amongst the Offi-
cers, to throw up their Commissions, in order to *force* the Com-
pany into allowing them the double Batta. The very Measure
shews that it was meant to *terrify and intimidate* the Company
into an Allowance of it. And the *Danger* of such a Combination,
and of all these Officers quitting the Service at once, is too ob-
vious

vious to be denied or doubted. There must, at the least, have been great Danger of an Insurrection amongst the *Seapoys* and Common Soldiers, though there might not have been any from the *Marattas*.

The Jury was a special Jury; and they brought in their Verdict for the Defendant: And I think there is no Ground for a new Trial.

Mr. Justice YATES—In Captain *Parker's* Case, We were clear in the abstract Opinion, “that these Officers can't resign at “*all* Times and under *any* Circumstances, whenever they please.”

As to their being bound *for Life*, by their Contract—I freely declare my Opinion “that they are *not*.”

But though no particular Period is fixed, and though they are not bound *for Life*, it does not, however, follow “that they “are at Liberty to quit under *all* Circumstances whatsoever.”

Here, Lieutenant *Vertue* was *in* the Service and *under* his Contract, at the *Time* when he quitted. He had received the advanced Pay; and was mustered on the 1st of *May*; and on the 6th demanded Permission to resign; and actually quitted, on the 8th. He ought to have given sufficient Notice, to prevent the advanced Pay and his being mustered. He signed himself “Lieutenant,” on the 6th; and acknowledged his being so, on the 7th.

This Combination being a criminal Act, it could not be a legal Determination of the Service.

Upon the Whole, there is no sufficient Reason for a new Trial.

Mr. Justice ASTON—The Plaintiff's own Letter shews “that he himself did not think he was at Liberty to resign, “without Permission from his superior Officer.” And if every Thing else that he Claims was to be admitted to him, yet there is no Pretence to say that he could be at Liberty to resign before the Expiration of the Month for which the Agent had received his advanced Pay. He had acknowledged himself to be a Lieutenant upon the 6th, and also upon the 7th: And his Letter imports his agreeing to continue so till the End of his Month.

There is no Reason for the Court's granting a new Trial.

Mr. Justice WILLES concurred; being of the same Opinion with the other Judges, "that this Gentleman was an Officer *in* the Service, at the *Time* when he quitted it."

Per CUR'. unanimously—

RULE DISCHARGED.

Martin and Others, Assignees of Edward Robarts, a Bankrupt, *v.* Thomas Pewtreffs and Josiah Robarts.

THIS was an Action of *Trover* brought by the Assignees of a Bankrupt, for large Quantities of Goods of the Bankrupt, to the Amount of 19,562*l.* 17*s.* 8*d.*

The Cause was tried before Lord MANSFIELD, by a special Jury, at *Guildhall*, at the Sittings after the last *Trinity* Term: And a Verdict was given for the Plaintiffs, for the above Sum.

The Defendants had obtained a Rule to shew Cause why, upon Payment of Costs, this Verdict should not be set aside, and a new Trial had.

Upon shewing Cause now, Lord MANSFIELD reported the Evidence.

The Defendants were Bankers, and large Creditors of the Bankrupt. *Edward Robarts*, the Bankrupt, is the Brother of the Defendant *Josiah Robarts*.

The Value of the Goods for which this Action is brought, got into the Hands of the Defendants in the following Manner. *Edward Robarts* bought Goods upon Credit, from several Tradesmen who did not suspect his Circumstances. The Defendants employed Agents to buy these Goods from the Bankrupt. Particularly, One *Nathaniel Sweet*, who had been a Bankrupt, and was then insolvent, bought, between *March* 1767 and *June* 1768, (when *Edward Robarts* became Bankrupt,) to the Amount of 7709*l.* at prime Cost: For which, he gave his Notes, payable at a future Day. These Notes were paid in to the Defendants: And *Sweet* sold the Goods for the Use of the Defendants, and accounted with them for the Profits, as their Agents.

The Defendants sent another Man, one *Moses Birch*, to buy Goods of the Bankrupt, to the Amount of 2163*l.* 15*s.* 11*d.* prime Cost; and furnished him with Bank-Notes to that Amount, to pay for them. He paid these Notes to *Edward Robarts* the

Bankrupt; who changed them, at the Bank, for others; which he paid in to the Defendants. *Birch* sold the Goods, for the Use of the Defendants; and paid them the Produce: And in like Manner, as to all the Rest. The Price, at prime Cost, was furnished in Paper, by the Defendants, to the Agent; received by *Edward Roberts*; and returned to the Defendants; or Notes given by the Agent, which Notes *Edward Roberts* paid in to the Defendants and discounted with them: And the Goods were all sold for the Benefit of the Defendants; and the Money accounted for, to them, by the nominal and apparent Purchasers.

This was a gross *Fraud* upon the *Creditors* of the Bankrupt; and a *Cheat*, by Covin and Collusion between him and the Defendants.

But I don't think it amounted to an *Act of Bankruptcy*; because there was no fraudulent *Deed* or *Conveyance*.

I left it to the Jury, to consider "Whether it was a *fair Sale*, " as between the Bankers and the Bankrupt; or a *Cheat*, to defraud innocent Persons from whom the Goods were bought."

This is an Action of Trover; in which the Plaintiffs could not recover, unless the Property was in the Bankrupt. The Jury have considered this as *no Sale*, but a *void Transaction*. Therefore it is void on *both Sides*: And the Bankrupt has his Goods. But the Defendants have no Right to set off the Debts, so as to have the Benefit of their Fraud.

The Bankrupt never dealt for more than 8000*l.* a Year, till this Transaction. Now, his Dealings were increased to 28,000*l.* in Eighteen Months. So that his Debts, which were before only about 6000*l.* were now increased to 23,000*l.*

The Counsel for the Plaintiffs (Mr. *Thurlow*, Mr. Serjeant *Glynn*, and Mr. *Mansfield*,) argued that this was as clear a *Fraud* as could be: And therefore the Defendants ought not to have *any* Advantage from it; much less, the *whole Effect* of it. The Possession which they obtained of these Goods was tortious, criminal, and unlawful. Therefore they had *no Title* to them: And this Action lies; and no Equity can be pretended against it. It was a Conveyance of them without any valuable Consideration: It amounted to an Act of Bankruptcy. It was a Combination to give an iniquitous and illegal Priority to a particular Creditor. The *whole Transaction* was fraudulent and *void*. It must have been in Contemplation of an approaching Bankruptcy; and tended to induce a general Belief "That this Bankrupt was engaged in an extensive Trade;" when, in Fact, the Goods were

not sold at all, but sent in to One Creditor, in Preference to the Rest; and to keep up the Bankrupt's Credit till that Creditor should be paid. *Edward Robarts* actually became Bankrupt in *June 1768*. The Defendants came to the Possession of the Goods by Tort: The Property remained in the Bankrupt. The Sale was merely colourable: It was a *void Contract*.

Therefore they have no Right to set off the Monies advanced, as a Debt due from the Bankrupt: For, that would give them the full Effect of their Fraud.

Though the Bankrupt himself, being Party to the Fraud, could not have sustained this Action; yet his Assignees *may sustain it*. All his Property is transferred to them. Therefore this Action of *Trover* lies, and it is the *proper* Action: And the Jury may assess Damages. No other Verdict could have been given.

The Counsel for the Defendants, who prayed a new Trial, (Mr. *Dunning* Solicitor-General, Mr. Serjeant *Davy*, Mr. Serjeant *Burland*, and Mr. *Cox*,) contended that it would not be just, that the Defendants should pay the *whole* Sum given by the Verdict; and, on the other Hand, only come in as Creditors for *Part* of it.

They contended also, "that *Trover* is not the proper Action."

They argued, that either the *Property* of these Goods *continued in the original Owners*, and *never vested in the Bankrupt*; (for if fraudulent, the Fraud would have affected the whole Transaction;) or else, it was transferred by him to the Defendants. In *neither* Case, could his *Assignees*, they said, maintain *Trover* for them.

In the former Case, the original Owners were intitled to the Action: In the latter, the Bankrupt might transfer these Goods to the Defendants or to whom he pleased, either with or without Consideration, at any Time *before* an Act of Bankruptcy was committed. The Assignees have no Right to recover them, *as* standing in the Place of the *Bankrupt*: For, the Transaction is clearly *good*, as against *him*.

If these Goods had been paid for in *Specie*, that Cash in *Specie* would have been paid into the Shop of the Defendants, just as the Notes were. So that this Circumstance makes no Difference.

The Defendants did not apprehend the Bankrupt to be *insolvent*, or in *Danger of Insolvency*, at the Time of this Transaction.

Therefore

Therefore no Action of Trover will lie: And it is the more improper; because there can be *no Set-off* in an Action of Trover.

LORD MANSFIELD—The two Grounds of this Motion are—1st, That the Jury have done wrong in finding the Transaction to be a *Fraud*: 2dly, That supposing the Transaction to be fraudulent, yet the Plaintiffs ought to have been *non-suited*. And if that be so, a new Trial ought to be granted; in order that they may have the Benefit of a Nonsuit, upon a new Trial.

As to the *Fraud*—The fraudulent Design and Intention must depend upon *Circumstances*.

In the present Case, 'tis as clear as the Sun, that the whole was a wicked Scheme, concerted between the Defendants and the Bankrupt *Edward Robarts*, to keep up his Credit, to enable him to get Goods which were to be employed to satisfy and discharge the Debt due to the Defendants.

One of them is Brother to the Bankrupt. They must have known his Insolvency: For, to their Knowledge, the Goods were sold at prime Cost. The Bankers did not deal in such Goods. Had they bought them openly and in their own Names, and applied the Money to sink the Debt due to them, the Neighbourhood would have been immediately alarmed. They knew that the Persons who sold their Goods upon Credit, to the Bankrupt, would never be paid.

But I did not think it amounted to an Act of Bankruptcy, for the Reason I have given; and left it to the Jury on the Point of *Fraud* affecting and annulling the whole Transaction.

I dictated my Apprehension of the Consequences of this Verdict, in taking the Account before the Commissioners, to the following Effect.

“ That in Consequence of the Verdict, the Notes given by
“ *Sweet* and the other Purchasers of the Goods, and delivered
“ or paid by the Bankrupt to the Defendants, are not to be con-
“ sidered or imputed as any Payments at all, being totally void.
“ And if any Money was paid by the Defendants to the Bank-
“ rupt, as in Consideration of such Goods so fraudulently sold,
“ such Money is received by the Bankrupt without any Consi-
“ deration; and therefore to the Use of the Defendants; and,
“ consequently, to be set off under the Commission.”

HIS LORDSHIP held the Action of *Trover* to be maintainable. A Trader can't alter the Property of Goods, by a Criminal fraudulent Transaction, to the Prejudice of his Creditors.

Mr. Justice YATES—The general Question is “Whether an Action of *Trover* is, in this Case, maintainable.”

One Objection to it is, “That the Defendants are precluded from a Set-off.”

But this would be an Objection against *all* Actions of *Trover*: For, there can be no Set-off, in *any* Action of *Trover*.

An Action of *Trover* must be founded on *Property*.

The Question then is “Whether this Transaction altered the Property, with respect to the *Assignees*.”

If *fraudulent*, it does *not* alter the Property.

The Assignees do not stand in the Place of the Bankrupt, in *every* Respect: Particularly, where the Act of Bankruptcy has been fraudulent.

It must be inquired therefore, “Whether this was a *Sale* and a *Transfer* of the Property.”

The Jury have considered it as *not* so: And I think they were well warranted in such their Notion of it.

It is said, “that the Bankrupt, *before* he had committed any Act of Bankruptcy, might have delivered the Goods, or paid the Money to whom he pleased.”

But here he has not done so; but has pursued a Method which is fraudulent, and which is calculated to cheat innocent Persons: And the Defendants were *privity* to it and *assisting* to keep up the Credit of a sinking Man, under *false Appearances*.

This can not be considered as a Sale. The Defendants are not Linen-Drapers; they had no Warehouses; they don't even appear in the Matter. It is a Scheme to save themselves, and to cheat innocent Persons—a fraudulent Design. This Action of *Trover* is a proper Remedy to relieve the Creditors.

He therefore concurred in Opinion, with Lord MANSFIELD.

Mr. Justice ASTON—The Question is “Whether the
“ *Property was changed by such a Sale as this.*”

He held that it was not. And he was of Opinion, that though this was not an Act of Bankruptcy in itself; yet being a Scheme concerted, at the Eve of a Bankruptcy, to cheat innocent Persons, in order to secure particular Creditors, it is such a *Fraud* as shall render the Sale *void*.

Then he mentioned several Circumstances which shewed the fraudulent Combination, and the Contrivance of it in order to avoid the Appearance of an express Preference, at the Expence of innocent Persons. He said, the Jury could not have found otherwise than they have done, unless they had been out of their Senses.

The Question “Whether this Action of *Trover* lies,” depends upon the Evidence: And that shews, “That the *Property was never altered.*”

Therefore the Verdict is very Right; the Action is well brought; And it is the only Action that could be brought.

Mr. Justice WILLES concurred.

Per CUR'. unanimously—

RULE DISCHARGED.

Friday 24th
Nov. 1769.

Vigers versus Aldrich.

THIS was an Action of Debt upon a Judgment. It appeared upon the Plea, and was admitted by the Replication, That the Defendant's Person had been taken in *Execution*, by Virtue of a *Capias ad satisfaciendum*, upon this Judgment; and afterwards *discharged* out of Custody, by *Consent* of the Plaintiff, upon his entering into an Agreement “to pay certain Sums of “Money at stipulated Times;” *Part* whereof he had accordingly *paid* to the Plaintiff pursuant to the said Agreement, but had *failed* in Payment of the *remaining Part*. The Plaintiff, in his Replication, acknowledged all this; and yet concluded it with demanding the *whole* Sum due upon the Judgment. The Defendant demurred to the Plaintiff's Replication.

Mr. *Ashburst*, for the Defendant, argued that the Defendant having been *once taken in Execution* upon this Judgment, and afterwards

terwards *discharged* of the Execution against his Person, by the *Consent* of the Plaintiff, he could not be liable to any further Execution upon it; nor could the Plaintiff bring an Action of *Debt upon that same Judgment*, which had been already so carried into Execution, and the Defendant so discharged from it. He also objected to the Replication, as *repugnant*, in persisting to demand the *whole* Sum recovered by the said Judgment; though it *admits* Part of it to have been *satisfied*.

Mr. *Mansfield contra*, for the Plaintiff, endeavoured to answer the first and principal Objection, by putting the Plaintiff's Consent to the Defendant's Discharge, upon the Foot of a *Conditional* One, and entirely rescinded or annulled by *Non-Performance* of the Condition; and therefore, in Event, *no Consent* at all. As to the Fault objected to, in the *Form* of the Replication; he said, it might be amended. But

THE COURT were clear with Mr. *Ashurst* in both Points.

They held this to be an *absolute Consent* in the Plaintiff, to discharge the Defendant out of Execution, in Consideration of a *new* Agreement then entered into, whereby he was to receive several Sums of *Money* instead of the *Person* of the Defendant; (which was all that he could have had, if he had kept the Defendant in Gaol;) and that he could not bring an Action *upon the Judgment*, after the Defendant had been taken in Execution and discharged by the Plaintiff's own Consent; but ought to have brought a new Action upon the Case, founded on this *new* Agreement.

Mr. Justice YATES added a strong Reason why he could not bring an Action upon the old Judgment; namely, that it was the constant Method of declaring, in an Action of Debt on a Judgment, to alledge in the Declaration, "that the Judgment " still remained altogether *unsatisfied*."

They also held the Replication *to be repugnant* in demanding the *whole* Sum, when it acknowledged it to be *satisfied in Part*.

Per CUR.' unanimously—

JUDGMENT for the DEFENDANT.

Richard Roe, on the several Demises of Elizabeth Haldane and Thomas Urry, *versus* William Harvey.

IN Ejectment—for certain Premises in *Newtown* alias *Frankville*, in the *Isle of Wight*. The Demises were laid on 6th of *October* 1768. The Cause was tried before Mr. Justice ASTON at *Winchester*.

He reported, that the Title opened for the Plaintiff was under Mrs. *Haldane*, as Devisee of *Robert Holmes*. Two Deeds were produced, (a Lease and Release,) dated 11th and 12th of *October* 1731, between the said *Robert Holmes* and *John Blachford*; whereby *Holmes*, in Consideration of 20*l*, conveyed to *John Blachford* and his Assigns, *Little Starles*, since called *Bides*, in *Newtown* alias *Frankville*; To hold to the said *John Blachford*, for Life. *William Clark* said that he had these Deeds from the Plaintiff's Attorney: And *Richard Clark* proved "That he received the Rents of these Premises for *John Blachford*, for the Years 1752 and 1753, of one *John Drake* since deceased." That *John Blachford* died in 1759: And that after his Death, this Witness received the Rents of the same Premises for Three Years, for *Robert Blachford* the Son of *John*, as Devisee of his Father.

That in 1765, this Witness was spoken to by Mrs. *Holmes*, for Mr. *Blachford* to give up the Possession; and that *Blachford* gave up the Possession.

Then the Will of *Robert Holmes* was produced, and proved; dated 24th of *January* 1738. It appeared that he died the 9th of *April* 1751; and by his Will devised all the Rest and Residue of his Estate whatsoever and wheresoever to his Wife *Elizabeth* her Heirs Executors and Administrators.

It was proved that Mrs. *Elizabeth Holmes* married Captain *Haldane*; and that he was dead.

There was *no Proof* of any Receipt of Rents, since the *Blachfords*: And *William Clark*, a Witness produced for the Plaintiff, upon his Cross-Examination said "That Mrs. *Haldane* had, before the 6th of *October* 1768, conveyed away her Interest in the Premises to Mr. *Thomas Urry*; and that the DEED was IN COURT."

Upon this, it was insisted by Mr. Serjeant *Burland* for the Defendant, "That the Plaintiff's own Witness proving the Title

“ out of Mrs. Haldane, and that the Deed of Conveyance to Urry
 “ was in Court, it ought to be PRODUCED in Evidence, to shew
 “ a Title in Thomas Urry, the other Lessor of the Plaintiff.”

The Deed's being in Court, or at least in the Plaintiff's Power, was not controverted. But, for the Plaintiff, it was insisted
 “ That no Notice having been given by the Defendant, for the
 “ Plaintiff to produce this Deed, they were not obliged to do it.
 “ And it was also insisted, that the Plaintiff ought to recover under One or the Other of the Lessors: For, upon this Evidence,
 “ if Mrs. Haldane had parted with the Title, yet Urry had it.”

It was answered, “ That this was not a Case which required Notice—“ That the Defendant did not claim under this Deed: It
 “ was only then disclosed by the Plaintiff's own Evidence; and
 “ to be produced, to complete his Title derived from Urry.”

Under the above Circumstances, Mr. Justice ASTON thought
 “ the Plaintiff ought to give further Evidence, to ascertain the
 “ Title, under which he was to recover the Term.

But the Plaintiff rested his Case; and was nonsuited; the Defendant agreeing “ That the Plaintiff should be at Liberty to
 “ move for a new Trial, without Payment of Costs.”

A Motion was accordingly made; a Rule to shew Cause; and Cause now shewn.

This Case was strenuously argued at the Bar, by several eminent Counsel on both Sides.

It was urged on behalf of the Defendant, That the Deed being confessedly in Court, and in the Power of the Plaintiff, ought to have been produced by him, in order to shew that Urry had a Title. For, his own Witness (*William Clark*) had proved that no Title remained in Mrs. Haldane; she having conveyed it away: And none appeared in Urry; as they refused to produce the Deed, though actually in Court, upon which they pretended that his Title was founded. So that, instead of shewing that Urry had a Title, this Refusal to produce the Deed was a good Ground of Presumption “ That in Fact he had none; and that there was
 “ some Defect in this Deed, or some Thing or other contained
 “ in it, which if it had been produced, would have shewn that
 “ he had none; and that they did not dare to produce it, because
 “ it would destroy their Title instead of proving it.”

As to the Objection urged on the Part of the Plaintiff, “ That
 “ the Defendant had not given the Plaintiff Notice to produce
 VCL. IV. PART IV. 7 D “ this

“ this Deed ; and therefore he was *not obliged* to produce it ;” their Answer was, That *Notice* to produce it, was neither *requisite nor practicable* in the present Case : For, the Defendant could not be apprized that the Plaintiff *had* any such Deed ; neither did the Defendant *claim under it*. On the Contrary, it was first disclosed on the Cross-Examination of the Plaintiff’s *own* Witnesses ; and ought to be *produced* by him, in order to complete the Title which he claimed *under Urry* ; which Title remained, otherwise, totally *unsupported*.

On the other Hand, it was argued by the Plaintiff’s Counsel, That even admitting “ that there was no need of their having “ had Notice to produce it,” or taking it upon the same Foot as if such Notice had been actually given to them ; yet they were *not* under any *Obligation* to produce it. They laid it down as a known and established Rule of Evidence, “ That though a Party “ had regular and full Notice to produce a Deed, the *only* Con- “ sequence of his *not* producing it, was, that the adverse Party “ should be let into prove the Contents of it by an *inferior* Species of Proof ; as, for instance, by reading a *Copy* of it, or by “ *Parol* Evidence :” Which the Defendant had not, in the present Case, either done or attempted to do. And as to the pretended Presumption “ that there might be some Defect in it, or some- “ thing contained in it which destroyed the Validity or Effect of “ it,” it was grounded upon mere Imagination : And so far was it from being at all probable, that on the contrary it must be presumed to convey at least an Estate for Life to Mr. Urry ; because the Witness (*William Clark*) had said, “ that the Convey- “ ance was made to *Urry*, in order to Qualify him to give his “ Vote for a Representative of the Burrough in Parliament ;” which must, therefore, be a Freehold. However, be the Presumption ever so strong, such Presumption ought to have been left to the Jury : The Plaintiff ought *not* to have been *non-suited*.

They insisted, with great Vehemence, that instead of being nonsuited, the Plaintiff ought to have had a *Verdict* : For, that his Title appeared to be a good One, without the Assistance of this Deed. He had laid a *double* Demise ; one from Mrs. *Haldane*, the other from *Urry*. The Evidence given by *William Clark*, was “ that Mrs. *Haldane* had had an Interest, but had “ *conveyed* it to Mr. *Urry*.” Therefore, most manifestly, there was an Interest remaining in ONE of the *two* Lessors of the Plaintiff : And it was indifferent to the Plaintiff, in *which* of the two it subsisted. If it was *out* of Mrs. *Haldane*, it was *in* Mr. *Urry* : For, *thus far* the Witness had clearly proved. And therefore they had a Right to rest the Matter here ; having claimed under two Demises, and shewn that there was a subsisting Right in the One

or

or in the Other of the two Lessors. So that, either under One Demise or under the Other, the Plaintiff had proved a good Title. Therefore this Nonsuit ought to be set aside; and the Cause go down to Trial again.

They urged the Propriety of adhering to the settled Rules of Evidence, and the Inconvenience which would attend the rendering those Rules again vague and fluctuating, by an unnecessary Departure from them after they had been fully established.

LORD MANSFIELD reasoned from the Nature of an Ejectment, and the Course of Proceeding upon it. He laid it down as a Position, "that in this Action, the Plaintiff can not recover, but upon the *Strength of his own Title*." He can not found his Claim upon the Weakness of the Defendant's Title. For, *Possession* gives the Defendant a Right *against* every Man who *can not shew a good Title*.

The Plaintiff here claims under a Widow who *never was in the Receipt* of the Rents and Profits. *Robert Holmes*, in *October 1731*, conveyed to *John Blackford*, for Life. *Blackford* died in *1759*. She was Widow and Devisee of *Robert Holmes*, who died in *April 1751*: But the Rents were received for *John Blackford* in *1752* and *1753*, and after his Death in *1759*, for Three Years, for his Son *Robert Blackford* as Devisee of *John* his Father; There was no Proof of any Receipt of Rent since the *Blackfords*. And the Witness produced for the Plaintiff proved, upon Cross-Examination, "that she had conveyed away her Interest in the Premises, to *Urry*, before the 6th of *October 1768*;" which was the Day on which both Demises were laid to be made. So that it is plain that the Plaintiff had *no Title* under the Widow, Mrs. *Haldane*.

Then, as to his Claim of a Title under *Urry*, he has *not proved* any Title in *Urry*. The Jury could not have found for the Plaintiff, *under the Deed of Conveyance to Urry, without producing it*. And probably, there was something in the Deed, which would have shewn, that *Urry* had *no Title*.

He principally laid stress upon the Plaintiff's *refusing to produce* the Conveyance from Mrs. *Haldane*, which was in Court. The want of Notice was no Objection, in *this Case*; because they had the Deed in Court. The Refusal to produce it was an unfair Attempt to recover, contrary to the real Merits: And being a deliberate Refusal, by the advice of Counsel, contrary to the Recommendation of the Judge, warranted the strongest Presumption "that the Deed would shew that neither of the Lessors of the Plaintiff had any Title."

Mr.

Mr. Justice YATES thought the Plaintiff ought to have had a Verdict. He founded himself upon the *Rules of Evidence*. Its coming out upon *Cross-Examination* of the Witness makes no Difference: No more does the *Value* of the Estate. The Plaintiff's Counsel were *not obliged* to produce this Deed: No Man can be *obliged to produce Evidence against himself*. The *only* Consequence of *Notice* to produce it would have been "the admitting inferior Evidence." He instanced in a Case which happened before himself; when a *Poll-Book* which *lay in Court* was refused to be produced: He held "they could *not* be obliged to produce it." And this his Determination was *acquiesced in*.

He thought the Counsel for the Plaintiff should not have suffered a Nonsuit; but should have *appeared*, and so had it *left to the Jury*, "Whether the Plaintiff had shewn a sufficient Title or not."

Mr. Justice ASTON—In an Ejectment, the Party who would *change* the Possession, must make out a Title. This was a scrambling Title. It was a Matter of small Value, excepting its being for the Purpose of voting at the Election of Members to Parliament.

The Conveyance from *Robert Holmes* to Alderman *Blackford* was in 1731. *Blackford* died in 1759. *Holmes* died in 1751, and devised to his Widow: She married *Haldane*. Alderman *Blackford's* Son entered as Devisee of his Father, and held it Three Years. Mrs. *Haldane* had no Title but as Devisee of *Robert Holmes*. *William Clark* the Witness *said*, she had conveyed to *Urry*. But the Plaintiff *shewed no Title under Urry*; which he ought to have done.

I was not called upon, to leave it to the Jury. I thought the Refusing to produce the Deed was a Want of Fairness; and that the Plaintiff had *not* made a *complete* Title, without it.

But if there is any Doubt in the Court, I have no Objection to a new Trial.

Mr. Justice WILLES thought the Direction was Right.

In Ejectment, the Plaintiff must recover upon the Strength of his *own* Title.

The only Proof here is, "that the Witness *said* that Mrs. *Haldane* had conveyed to *Urry*:" But he *would not produce* the Deed of Conveyance to *Urry*, though actually in Court.

I don't

I don't say that the Court could *oblige* them to produce this Deed. But I think the Title of the Plaintiff was *not complete*; the Deed *not* being produced.

Parol Evidence could not be given *by the Party* who had the Deed in his *Power*, and refused to produce it; though it might *by the adverse Party*. It is reasonable, that if one Party is in Possession of a Deed, and refuses (after proper Notice) to produce it, the *other* Side should be admitted to prove the Contents *by inferior Evidence*: But there is no Reason why the Possessor of the Deed should be allowed to give such inferior Evidence, when he *can* give better, if he pleases.

LORD MANSFIELD observed, that in *Civil Causes*, the Court will force Parties to produce Evidence which may prove against themselves; or leave the Refusal to do it (after proper Notice) as a strong Presumption, to the Jury. The Court will do it, in many Cases, under particular Circumstances, by Rule before the Trial; especially, if the Party from whom the Production is wanted applies for a Favour. But in a *Criminal* or *Penal Cause*, the Defendant is never forced to produce any Evidence; though he should hold it in his Hands, in Court.

Per CUR'.

RULE DISCHARGED.

Cuming versus Sibly.

ERROR was brought by the Defendant below, upon a Judgment for the Plaintiff in *C. B.* in an Action of Debt, upon the Bribery-Act of 2 G. 2. c. 24. § 7. Upon the Trial, a Verdict was given for the Plaintiff, for 1000*l.* and 1*s.* Damages; besides his Costs and Charges; and so much for his Costs and Charges: And Judgment was entered accordingly, and for Costs *de incremento*, so much; amounting in the whole to so much.

The Error objected was, "that the Plaintiff is not intitled to "Damages: No Damages for Detention of the Debt can be "given in a *popular Action*." 1 *Roll's Abridgment* 574. Letter P. *pl.* 1. and *pl.* 4. in Point. So also was the Case of *Sir Thomas Frederick v. Andrew Lookup*: (Which Case may be seen at large, *ante*, p. 2018 to 2022.*)

Mr. *Ashburst*, for the Plaintiff below, answered, that that was an Action on the Gaming-Act; and was brought for the Money lost, and the treble Value. And he said there is a Difference between

*N. B. In that Case, the Court reversed the Judgment as to the Damages and Costs.

Penal Statutes which give a Sum *certain* and an Action of Debt to the Party suing; and those which give an *uncertain* Sum, (as to recover treble Damages.) In the *latter* Case, there can be no Damages for the Detention, nor any Costs: But in the *former*, the Plaintiff shall recover both his Damages and Costs.

The Case of *North v. Wingate*, in *Cro. Car.* 559, lays down and establishes that Distinction. And 3 *Lev.* 374. *Sedgwick*, *qui tam &c.*, v. *Richardson*, takes the same Distinction, and is at least a tacit Authority for me. And he observed, that the Declaration always lays it to the Plaintiff's Damages.

Here, a Right is attached in the Plaintiff, by bringing the Action: And the Defendant ought to have paid the Money immediately upon Demand. Therefore the *1s.* Damages for the Detention is right; and the Judgment ought to be affirmed *in toto*.

But, at least, it ought to be affirmed as to all the Rest, but the *1s.* Damages.

Mr. Serjeant *Glynn*, *contra*, for the Plaintiff in Error, replied, that in the Case cited from *Cro. Car.* 559, the Plaintiff was the Party grieved: And in 3 *Lev.* 374, nothing was determined, upon that Part of the Case.

He insisted, that *no* Damages for Detention of the Debt can be given in a popular Action; because Nothing, no Interest is attached in the Plaintiff, before his bringing the Action: He had, before that, no more Right than any other Man. Therefore the giving him Damages is erroneous.

Consequently, the Judgment must be reversed both for the *1s.* Damages, and for the *Costs*; as the *Costs* are *incorporated* with the Damages.

LORD MANSFIELD—There are no Damages to be given in these popular Actions. This *Statute* gives Costs, indeed: But here the Damages and Costs are blended together.

Where the Plaintiff below brings a Writ of Error, we may not only reverse what is wrong; but give Judgment for what is right. Where the Defendant below brings a Writ of Error, we only reverse such wrong Part of the Judgment, as he complains of.*

* Vide ante, p. 2156. and 1 Salk. 262.

Mr. Justice YATES—The Plaintiff has no Right to the Debt, till *after* Conviction. Therefore he can have no Right to Damages

Damages for the Detention of it. And as the Costs and Damages are incorporated, the Judgment must be reversed as to both Damages and Costs.

THE COURT all agreed, that the Judgment ought to be reversed both as to the *Damages and Costs*; and affirmed as to the *Debt*.

RULE ACCORDINGLY.

Rex versus Berney Brograve, Esq.

ON the Second Day of this Term, Mr. Solicitor-General (*Dunning*) moved to quash an Order of Sessions confirming a Rate made for the Relief of the Poor of the Parish of *Worstead* in the County of *Norfolk*.

THE ORDER objected to, was made at a General Quarter-Sessions holden for the County of *Norfolk*, on the 5th of *April* 9 G. 3. and was in the following Words.

Whereas *Berney Brograve*, Esq. one of the Inhabitants of *Worstead* in the County of *Norfolk*, appealed to this Court, to be relieved against a Rate made, in due Form, the 6th Day of *January* 1769, for the Relief of the Poor of the said Parish, wherein the said *Berney* is assessed of 160 l. 3 s. 9 d. per Annum; whereof 3 l. 15 s. is charged for the Profits of a Fair held once in every Year in the said Parish; and for *Inequality* throughout the whole of the said Rate. And whereas it was admitted, on the Hearing of the said Appeal, “ that some Time in the Year 1763, “ the said *Berney Brograve* appealed from a Poors Rate then “ made for the said Parish; and that afterwards, the said Appellant and the then Officers of the said Parish of *Worstead* referred all Matters in Dispute touching the said former Rate, “ between the said Appellant and the then Officers of the said Parish, to the Determination of Three of his Majesty’s Justices “ of the Peace for the said County then acting for that Division “ to which the said Parish of *Worstead* did belong; That in the “ Year 1764, the said Three Justices, in order to settle all Disputes, did recommend the Parties to consent to the Rate then “ made according to the Method they had formerly taken; but “ did not particularly recommend nor object to the Mode of “ Rating itself, which was, that All Occupiers of *Land* in their “ several Occupations, within the said Parish, should be assessed “ at three-fourths of the YEARLY VALUE of such *Land*; and “ that all Occupiers of *Houses* within the said Parish should be “ assessed

“ assessed after the Rate of *One MOIETY of the YEARLY VALUE*
 “ of their respective *Houses*; to which Rate so made, the Ap-
 “ pellant, being then present, did *CONSENT AND AGREE*; And
 “ that the Churchwardens and Overseers of the said Parish did
 “ accordingly *continue* to make their Rates for the Maintenance
 “ of the Poor pursuant to such Agreement, and did therein as-
 “ sess the Appellant *and all other Occupiers of Land* within the
 “ said Parish at *three-fourths* of the yearly Value, and the Occu-
 “ piers of all *Houses* within the said Parish at *One MOIETY only*
 “ of their respective *yearly Value*; and *did continue assessing them in*
 “ *such Manner* down to the *Michaelmas Quarter 1768.*” That
 the Appellant, thinking himself aggrieved by the Assessment
 made for the Relief of the Poor from *Midsummer to Michaelmas*
 1768, did, in the latter End of *November* or the Beginning of
December now last past, and before the Rate appealed from was
 made, give Notice to the Churchwardens and Overseers of the
 said Parish, “ that unless the said Parish-Rates were altered, he
 “ the said Appellant *would not abide by them*; and that he was
 “ *quite dissatisfied* with the said Rates;” but did not then or at
 any other Time make any *particular* Objections to the said Rate
 or the Mode in the which the same was made, until the Time of
 hearing the said Appeal. That the said Churchwardens and
 Overseers of *Worstead* aforesaid did, on the 6th Day of *January*
 last past, make a Poors Rate for the said Parish, for one Quarter
 of a Year from *Michaelmas* to *Christmas* last; wherein they did
 assess and rate the said Appellant and *all other Occupiers of Lands*
 within the said Parish, at and after the Rate of *three-fourths* of
 their respective *yearly Value*, and the *Occupiers* of all *Houses* in
 the said Parish at and after the Rate of *One Moiety* of the respec-
 tive *yearly Values* of the Houses in their respective Occupations,
 within the said Parish; from which Rate, Mr. *Brograve* ap-
 pealed. And it appeared, that all other Persons assessed to the
 said Rate had paid to the same, except the said Mr. *Brograve*.
 AND now, at the hearing of the said Appeal from the Whole of
 the last mentioned Rate, the Appellant made many Objections to
 the said Rate; and in particular, “ for that he was rated 3*l.* 15*s.*
 “ for the Profits of the *Fair* in the said Parish,” (which, upon
 Evidence, appeared to be Let by him to ----- *Fowler*;) and
 also, “ for that *Henry Middleton*, who occupied about Seven
 “ Acres of Land as Tenant to the Appellant was *not rated* for
 “ such Land.”

And thereupon the Court [of Sessions] ordered the said last
 mentioned Rate to be *amended*, by striking out the particular
 Part wherein it appeared “ that the Appellant was rated and as-
 “ sed for the said *Fair*,” and by therein assessing the said *Henry*
Middleton for the said Seven Acres of Land; he the said *Henry*
Middleton being present in Court, and consenting thereto: And
 they

they have *amended* the Rate accordingly; but *confirmed* the said Rate, as to *all the Rest*.

Mr. *Dunning*, Solicitor-General on behalf of Mr. * *Brograve*, moved to quash this Order of Sessions; objecting, "that it was an *unequal Rate*; and that it appeared, upon the Face of it to be so: For that the Occupiers of *Houses* and the Occupiers of *Lands* ought to be rated *equally*; and there was no Pretence to Rate the latter at *three-fourths* of their yearly Value, when the former were only rated at *two-fourths*.

* Mr. Brograve was much dissatisfied at the State of this Case; and asserts, that the Facts are not rightly represented, as the Order is drawn up.

LORD MANSFIELD said, he did not see any apparent Inequality. He thought it right and proper, that there should be a Difference made between Lands and Houses: For, there are several Charges incident to Houses (as Repairs, Window-taxes, and such like Deductions and Outgoings,) which do not fall upon Lands, to lessen *their* Value. And this Mode of Taxation was agreed to by the Parish in 1764, and by the Appellant himself, being then present; and was continued till 1768.

Mr. *Dunning* objected, nevertheless, to the laying down any *standing, invariable, perpetual* Rule in a Parish: And as this Rule is now perceived to be an unequal and unequitable one, this Appeal was brought, in order to *correct* it, and to fix a true just and equal One, suitable to the Circumstances at present existing.

LORD MANSFIELD—The Justices have thought it an equal Rate; and all the Parish were of that Opinion in the Year 1764.

Mr. Justice YATES—The *Court* can't enter into the Inequality of it; unless it appears to Us to be self-evidently, necessarily, and unavoidably unequal.

THE COURT gave him a Rule to shew Cause; but with very small hopes of their being persuaded to make it absolute.

Mr. Serjeant *Foster* now shewed Cause, why the Order of Sessions should not be quashed, nor the Rate which stood confirmed by it.

Mr. Solicitor-General still insisted that this was an *unequal Rate*; and that an unequal Rate was an *unequitable Rate*.

The *Rent*, he said, was the Rule of rating.

This is a Rate upon the *Occupier*, not upon the Land. And an Occupier of a *House* of 20*l.* a Year is generally *better* able to pay his Rate, than a Farmer who occupies a Farm of 20*l.* a Year.

The Court will understand the Word "*Value*" in the Order, to mean the yearly *Value*, and not the yearly *Rent*. It is impossible therefore to construe this to be an equal Rate; when it directs "that Lands shall for the future pay *Three-fourths* of the " yearly Value; and Houses *only half* of *their* yearly Value."

THE COURT were clear they could not set this Rate aside, unless it *appeared manifestly* to be unequal: They could not *presume* it to be so. But it would be impossible to presume an Inequality in the present; when, on the contrary, this Gentleman himself has approved of it; and all the other Parishioners have agreed in it.

Per CUR'. unanimously—

RULE DISCHARGED; and ORDER AFFIRMED.

Monday 27th
Nov. 1769.

Rex versus Samuel Vaughan.

ON *Friday* the 17th Instant, Mr. *Dunning*, Solicitor-General, moved for an Information for a Misdemeanour, at the *private* Prosecution of the Duke of *Grafton*, (then first Lord of the Treasury.)

He produced an Affidavit of the Duke of *Grafton's*, proving a Letter to be received by him from the Defendant, containing an Offer of paying 5000*l.* into the Hands of Mr. *Henry Newcome*, to be delivered by him to the Person who should procure a Patent of the Reversion of the Office of Clerk of the supreme Court of the Island of *Jamaica*; for the Lives of Mr. *Vaughan's* Three Sons, or the Lives of Three other Persons to be named by him.

He had likewise Affidavits to authenticate the Hand-writing of Mr. *Vaughan*.

Mr. *Vaughan* sent a *Case* also to the Duke, desiring his Perusal of it at his Leisure; which *Case* related to the Nature &c, of this Office.

It

It was accompanied by a Letter to his Grace, inclosing an Affidavit; which Affidavit Mr. *Vaughan* says, "will shew the *Proposal*; which will be ENCREASED if necessary." The Letter offers to "leave Security in Mr. *Henry Newcome's* Hands, to answer Paying the 1000*l.* to the Order of the Person who should procure the said Patent." And it concludes—"I will take an Opportunity of waiting upon your Grace; hoping the Honor of a Conference; otherwise, to receive back this Affidavit, in order to destroy the same."

The Affidavit inclosed in this Letter was made before the Lord Mayor of *London*. It represented this to be a Matter that required the utmost Secrecy: And it is thereby sworn, (besides what is above mentioned) "that this whole Affair is an entire Secret to every One but Mr. *Henry Newcome*; and that, whether his present Proposal shall prove efficacious, or be rejected, he never will disclose it to any Person whatsoever."

The Court had asked Mr. Solicitor-General upon his first moving this Matter, "In whose Disposition this Office was;" and wished, that there might be an Affidavit to that purpose.

Accordingly, an Affidavit of one Mr. *Pollock* was now produced and read—"that the Office was in the Disposition of the King, and passed by a Grant under the Great Seal, which took its Rise from a Sign-manual counter-signed by one of the Secretaries of State."

There was likewise another Affidavit now read, of one Mr. *Reynell*—"That the supreme Court of *Jamaica* is like the Three Courts of B. R. C. B. and Exchequer, in *England*: Besides which, they have also a Court of Chancery."

Mr. *Wedderburn* and Mr. *Lee*, on behalf of the Defendant, now shewed Cause against granting an Information.

This Office of Clerk of the supreme Court of the Island of *Jamaica* was sold under a Decree in Chancery here, upon the *Cestui qui* trust of it dying insolvent.

Mr. *Lawton* bought it, and afterwards devised one Moiety of it. The Representatives of Mr. *Paxton*, sold the other Moiety. The Subdivisions of it have been since both devised and sold. The Office was, consequently, very carelessly executed by Deputies.

Mr.

Mr. *Vaughan* took a Lease of the Office in 1765; and put it upon a proper Footing. He went to *Jamaica* in 1765; and returned in 1766; and then applied to the Duke of *Grafton* and Mr. *Conway*, who were then the Two principal Secretaries of State, for a Grant of the Reversion. He applied to the Duke through this Mr. *Newcome*. The Duke's Answer was, "That he did not meddle out of his own Department." One Mr. *Howell* was attempting to procure it, and to get in the subsisting Interest; pretending to have the Patronage of the Duke of *Grafton* in the Point he was pursuing. This alarmed Mr. *Vaughan* on account of his *Lease*, as well as of the Reversion. *Howell* and *Vaughan* had a Treaty upon this Subject: And *Howell* persisted in his Attempt. Mr. *Vaughan* thought that *Howell*'s Interest must arise from *Money*; and therefore counteracted him by the same Means: And, to remove all Ideas of using this Application as a *Trap*, he made the Affidavit of Secrecy, and sent it inclosed to Mr. *Newcome*. Mr. *Newcome* returned the Affidavit: And then Mr. *Vaughan* sent it to the Duke.

The *old Rent* of the Office (the *nett Rent*) was 400*l. per Annum*: It has been now lately raised to 750 Guineas for the *Moiety* of it. The Office had been *sold, devised, leased*, and very badly executed by *Deputy*.

Mr. *Vaughan* never mentioned the Affair to any One. And yet two Letters appeared in the public Papers, calculated to affect Mr. *Vaughan*'s Character; but fictitious in several Articles. These spurious Letters represented him as a Man that had abandoned his Connexions and Principles. They treated Mr. *Vaughan*'s Conduct, as extremely silly, and very unlikely to have its Effect; and also as shewing the utmost Ignorance of the World.

But as he took the Office to be a *saleable* Office, his only Offence could be, that he suspected the noble Duke to be capable of listening to this his Offer. And his Affidavit only meant to clear him from intending to trap the Duke into a Transaction with a Man obnoxious to him in Politics; and then discover it.

They hoped, the Court would not add the Weight of their Opinion, to the already prejudiced Opinion of the Public.

They then argued that this was *no Offence* at all.

The Solicitation to take Money for an Office in the *Colonies*, is no Offence. It would have been no Offence, even if the Act itself had been done; and the Office had been granted pursuant to the Solicitation.

It is not within 5, 6 *Ed. 6. c. 16.* That Act does not extend to the *Colonies*. The saving in § 7. shews that it was no Offence at Common Law; that it was *not illegal*: For, this Proviso leaves it to the two Chief Justices of B. R. and C. B. and Justices of Assize, to do as they might have done before, in any Office to be given or granted by them. This proves that the Legislature did not consider this Sale of Offices to be *Malum in se*.

The Case of *Blankard v. Galdy* (in 2 *Salk.* 411 and 4 *Mod.* 215.) also proves the same Point; because Judgment was given for the Plaintiff. That Case was an Action of Debt upon Bond, conditioned for performing Articles of Agreement concerning the Office of Provost-Marshal of *Jamaica*: And it was then settled and determined, "that this Act of 5. 6 *Ed. 6.* does not extend to *Jamaica*."

In the Case of *Godolphin v. Tudor*, it was determined that if the Reservation be out of the Profits, the Deputation is good: But if it be a Sum in gross; then it is within the Statute.

The Sale of any Office is *not Malum in se*; notwithstanding the inaccurate Report of the Case of *Stockwell v. North*, in *Noy* 102, and also in *Moor* 781. It is *no Offence at Common Law*: 'Tis no *Crime*; no Object of positive Punishment. It is not *immoral*, if a good Man and a sufficient One is promoted to the Office. Neither is it unlawful: For, in the Case in *Salkeld*, Judgment was given for the Plaintiff. Nor is there any Resolution or even Dictum "that it is unlawful."

The Offices at the Rolls and in the Exchequer concern the Administration of Justice, and are not within the Proviso in the Act: And yet those Offices are sold.

Therefore if the Act had been *done*, and the Proposal carried into Execution, it would not have been punishable at Common Law. Much less then, can the mere *Solicitation* to do it be so; no Act being done, in Consequence of it.

There is one Case of a Solicitation to commit Perjury, none being actually committed; in 2 *Skower* 1. *Rex v. Johnson*, an Attorney. But this is a single Case, and very imperfectly reported.

Mr. *Dunning*, Mr. *Wallace*, and Mr. *Ranby*, *contra*, for the Prosecutor.

The Charge is an Attempt to corrupt the Duke of *Grafton* in the Disposal of an Office of *Trust*, in the *Colonies*, concerning the
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Administration of Justice; to influence a Privy Counsellor and first Lord of the Treasury, to give his Advice, under a Bribe.

As to this Office being once *sold under a Decree*—It does not appear, what was then proved or understood about the Nature of the Office. But even if it is saleable, that will not warrant a Man to solicit One of the first Officers of the Crown to take a *Bribe for procuring* from the Crown the Disposal of the Reversion of it.

This Attempt is *criminal* in the Tempter: And the Court will declare it to be so, by granting this Information.

The Judgment of the Court in the Case of *Blankard v. Galdy*, might have been given, because the Matter was *not within* the Act.

But neither that Act nor the Act of 12 Ric. 2. c. 2. mentioned in Lord *Macclesfield's* Trial, are necessary to support this Motion.

It may be neither criminal or dishonorable, to *sell* Offices which are *saleable*. But granting that Point, yet the Method which Mr. *Vaughan* has taken to come at this Office, is criminal. 1 Hawk. P. C. c. 67. Title, "Bribery," p. 168, 169. is strong to this Purport.

In Lord *Macclesfield* Case, the Offence charged was taking Money for appointing, and taking Money for *recommending* to Offices. That Prosecution was not founded upon Statute, but upon Common Law. One of those Offices, Clerk of the Custodies, (*v. Art. 9.*) was in the Gift of the Crown; and Lord *Macclesfield* insisted on a Right to recommend. But yet he was not to take Money for that Recommendation.

So here Mr. *Vaughan* offered the Duke of *Grafton* 5000*l.* for such Recommendation: Which Money the Duke ought not to take for it.

This offer is *criminal*; because the Taking the Money was incompatible with the Duty of the Duke of *Grafton*, as a Privy Counsellor and first Lord of the Treasury: It was offered, to tempt the Duke to *betray his Trust*, by giving his Advice to the King under such a *corrupt Motive*.

To *solicit and counsel* the Committing of a Crime, is criminal.

As to the Case of *Rex v. Johnson*, in 2 *Show. p.* 1.—It shews that the Charge was considered *as an Offence*; though the Judges differed about the Measure of the Punishment.

As to what has been urged about this Solicitation not being criminal, because there was *no Act* done in Consequence of it—The Case of *Rex v. Plympton* 2 *Lord Raymond* 13-8. is in Point: For, that does not appear to be a Promise *accepted*, or the Money paid. This very Exception, “that the Promise was no Crime, “without shewing the *Fact done*,” was taken, and over-ruled.

In *Bush v. Rawlins*, *Tr.* 29, 30 *G. 2 B. R.**—No Doubt was made whether it was not an Offence at *Common Law*: The Question was “Whether it was *within the Act*.” * Vide ante, vol. 3. p. 1236.

Here was an ill Intention in the Tempter; and an Ability in the Duke to perform the Thing proposed, if he had listened to the Proposal.

LORD MANSFIELD---The Defendant himself thought, this Transaction would not bear the Light. His Affidavit says “It was a Matter that required the utmost Secrecy.” The extraordinary Security for the Money, which he proposed to leave in Mr. *Newcome*’s Hands; the Affidavit offering to pay it, and swearing to keep it a profound Secret; and the other Circumstance, all prove that he himself looked upon it as an unjustifiable Transaction.

If these Transactions are believed to be frequent, it is Time to put a stop to them.

A Minister trusted by the King to recommend fit Persons to Offices would betray that Trust, and disappoint that Confidence, if he should secretly take a Bribe for that Recommendation.

A terrible Consequence would result to the Public, if every Thing that such an Officer is concerned in advising the Disposal of, should be set up to *Sale*.

I am therefore for making the Rule absolute. He may demur, or move in Arrest of Judgment, or appeal to a higher Judicature. I am clear, that this is a Misdemeanor, and punishable as such. But nevertheless I shall be open to hear Arguments on a Demurrer, or in Arrest of Judgment, without Prejudice.

As to the Statutes of 12 *R. 2. c. 2* and 5, 6 *Ed. 6. c. 16*. I agree with Mr. Solicitor-General, “That the Argument does
“ not

“ not turn upon their extending or not extending to *Jamaica*.”
For, this Office is granted under the Great Seal.

The Argument is strong, that these Statutes do not extend to *Jamaica*; though they were enacted long before that Island belonged to the Crown of *England*.

If *Jamaica* was considered as a *Conquest*, they would retain their old Laws, till the Conqueror had thought fit to alter them.

If it is considered as a *Colony*, (which it ought to be, the old Inhabitants having left the Island,) then these Statutes are positive Regulations of Police, not adapted to the Circumstances of a new Colony; and therefore no Part of that Law of *England* which every Colony, from Necessity, is supposed to carry with them at their first Plantation.

No Act of Parliament made after a Colony is planted, is construed to extend to it, without express Words shewing the Intention of the Legislature to be “ that it should.”

But here, the Office is granted by Letters Patent under the Great Seal of *England*; and therefore must be governed by the Laws of *England*.

So that it turns upon the *Common Law*. And the first Consideration is, whether a great Officer, at the Head of the Treasury and in the King's Confidence, selling his Interest with the King, in procuring an Office, be not guilty of a Crime.

The King is not to raise a Revenue out of this Office. The Duke swears, and it is not denied, “ That the 5000*l.* was offered “ to him, to *procure* this Office for Mr. *Vaughan*.”

Can it be doubted whether the doing this would have been criminal in the Duke of *Grafton*? I suppose that most of the Impeachments against Ministers have been for taking Money to procure Offices grantable by the Crown.

Wherever it is a Crime to *take*, it is a Crime to *give*: They are reciprocal. And in many Cases, especially in Bribery at Elections to Parliament, the *Attempt* is a Crime: It is complete on *his* Side who *offers* it.

If a Party offers a Bribe to a Judge, meaning to corrupt him in a Case depending before him; and the Judge taketh it not; yet this is an Offence punishable by Law, in the Party that offers it.

3 *Inst.* 147. So also a promise of Money to a Corporator, to vote for a Mayor of a Corporation; as in *Rex v. Plympton*.* • 2 Lord Raym. 1377. And so also must be an offer to Bribe a Privy Counsellor, to advise the King.

Therefore it appears to me that this is a Misdemeanor.

But if it be in the least doubtful, I would have it put in such a Way, that a Judgment may be solemnly had upon it.

Mr. Justice YATES—This has not the least Resemblance to the Sale of an Office. This Charge is for attempting improperly the *procuring* of the Office; not for giving a Price for bestowing it. It is an Office in the Gift of the Crown; not of the Duke himself.

The Affidavit which mentions “that the Matter requires the utmost Secrecy,” shews the Defendant’s own Sentiments about it: And he desires, in Case of Non-Acceptance of his offer, to have the Affidavit back again, in order to destroy it. This don’t agree with the Excuse about a Trap.

No Doubt, this is an *Offence at Common Law*.

If it be but questionable, it ought to be inquired into: ’Tis a Matter fit for Inquiry. It may hereafter be more solemnly determined, on Demurrer, or in Arrest of Judgment, or otherwise.

Mr. Justice ASTON and WILLES concurred.

Per CUR. unanimously—

RULE made ABSOLUTE.

Evan Thomas *versus* Goodtitle.

Tuesday 28th
Nov. 1769.

IN Ejectment, on a Writ of Error from C. B. Evan Thomas, the Defendant below, and now the Plaintiff in Error, offered to become Bail to prosecute the Writ of Error, and to justify in *Double the Rent*.

Judgment had been given for the Plaintiff in Ejectment; and also for 29*l.* Costs.

Mr. Griffith Price opposed the Bail, on Affidavit of his *Insolvency*, and having been discharged out of Gaol as an Insolvent Debtor;

Debtor; and alledged that the Plaintiff in Ejectment had a Mortgage upon the Premises, for as much as they were worth.

See the Act of 16, 17 C. 2. c. 8. § 3. which directs, that the Plaintiff in Error should be bound to the Plaintiff in the Action of *Ejectione firmæ* &c, in such *reasonable* Sum as the Court to which such Writ of Error shall be directed shall think fit; with Condition, that if the Judgment shall be affirmed in the Writ of Error, or the Writ be discontinued in Default of the Plaintiff therein, or the Plaintiff be Nonsuit in such Writ of Error, that then the Plaintiff shall pay such Costs, Damages and Sums of Money, as shall be awarded, upon or after such Judgment affirmed, Discontinuance, or Nonsuit had.

The COURT, on Consideration of the Clause in the Statute, and also of the *Practice*, (which is to require him to *justify in Double the Rent*,) did accordingly admit him to be Bail: And, the Rent being 16*l. per Annum*, he justified in Double that Sum (32*l.*)

They said, they had Nothing to do with the Mortgage.

Jacobs's Case.

ON a Motion of Mr. Kenyon's "for Jacobs to answer the
" *Matters of an Affidavit*."

* See the Note
in p. 651. vol.
1. with Rela-
tion to Attach-
ments, and
quashing In-
dictments and
Orders.

The COURT declared, That on the *last Day of the Term*, there can not be a Motion to *answer the Matters of an Affidavit*, any more than a Motion for an *Attachment*. They held it to be contrary to the Practice *

MOTION DENIED.

Belchier *versus* Gansell.

IN an Action for 2334*l.* Bail had justified: But, as the Plaintiff did not like them, he and his Attorney therefore obtained a Side-Bar Rule "for Leave to *discontinue* that Action, upon " Payment of Costs;" *not disclosing*, that Bail had justified in the Action which he prayed to discontinue. Then he brought a *new* Action, upon the very same Bonds; only laying the new Action in *Middlesex* instead of *London*. The Plaintiff made a fresh Affidavit of the Debt being due; and carried this Affidavit and the
Decla-

Declaration in the new Action, to Mr. *Cowper* the Clerk of the Rules, and insisted upon his marking upon the Declaration "that such a Debt was sworn to;" in order to carry such Declaration so marked by Mr. *Cowper* to the Marshal, and charge Mr. *Gansel*, in Custody, with this new Declaration. The Scheme was, to detain him in Custody of the Marshal till the next Term; as, this being the last day of the present Term, Mr. *Gansel* would not be able to justify Bail in this *new* Action, till next Term.

Mr. *Cowper* himself first disclosed this Matter to the Court; and prayed their Direction.

The COURT sent Orders to Mr. *Priddle*, the Plaintiff's Attorney, (by his Clerk,) "to attend the Court immediately." Which he soon afterwards did; and cited, in his own Justification, 2 *Stra.* 1216. *Olmus v. Delany*: Which is indeed a very strong Case; rather stronger than the present, as the Defendant was there holden to special Bail in the second Action, though he was *arrested* upon it *before* the former was discontinued.

Mr. *Mansfield* then moved against him; but was in Doubt what to pray.

Mr. Serjeant *Davy* appeared for Mr. *Priddle*; and said he had done it by the Direction of his Client Mr. *Belbier* the Plaintiff; who had discovered, "that the Bail in the first Action were worth "Nothing at all, but totally insufficient:" And this was only taking the likeliest Method of securing the Payment of a just Debt.

The COURT* were, at first, doubtful what Method they should take. They held this to be a *Trick*, and an unwarrantable Conduct in the Attorney; and that it ought not to have the intended Effect: He ought to have *asked Leave of the Court* "to charge the Defendant in Custody;" *disclosing* the Whole of the Case to them. They first thought of making a Rule *now*, for the Defendant "to shew Cause why the Plaintiff should not be "at Liberty to do so."

* Lord Mansfield was gone.

But at length, They discharged the Side-Bar Rule which gave the Plaintiff Leave to discontinue. So that the Bail to the former Action (who had justified as aforesaid) *still remained* liable to their Recognizance.

RULE to discontinue, DISCHARGED.

Curgenven

Curgenven *versus* Penhallow Cuming Esq.

THIS was an Action of Debt brought upon the Statute of 2 G. 2. c. 24. against Bribery at Elections to Parliament.

In *Trinity* Term last, the Plaintiff declared against the Defendant for 6000*l.* for bribing Twelve Persons, to vote at the last Election for Members to serve in Parliament for the Burrough of *Tregoney* in the County of *Cornwall*.

The Defendant pleaded *Nil debet*: And Issue was thereupon joined.

The Cause came on to be tried at the last Assizes for *Cornwall* before Mr. Justice WILLES; and a Verdict was found for the Plaintiff on the 1st, 4th, 5th, 7th, 8th and 12th Counts, in the Penalties of 3000*l.* with 1*s.* Damages, and 40*s.* Costs; subject to the Opinion of the Court of B. R. upon the following Case.

CASE—The Defendant proved a Copy of a Judgment in the Court of Common Pleas, of *Hilary* 9 G. 3. between the said *Penhallow Cuming*, Plaintiff, and one *John Sibley*, Defendant; by which Judgment it appeared, that the said *Cuming* had obtained a Judgment against *Sibley* for 1000*l.* upon the said Statute of 2 G. 2. c. 24. against Bribery at Elections.

The Defendant also proved, that a *Capias ad respondendum* issued in the same Cause on the 20th of *December* 1768, tested the 28th of *November* 1768.

The Question was “Whether the said Defendant *Cuming* is a Discoverer indemnified under the said Act of 2 G. 2. so as to be discharged from the Penalties and Disabilities incurred by the Offences mentioned in the Declaration in this Cause.”

It was argued on *Tuesday* the 14th of this Month by Mr Serjeant *Burland* for the Plaintiff, and Mr. *Mansfield* for the Defendant.

Lord MANSFIELD observed, that the Court had not said nor would say, “That a Plaintiff *can not* be the Discoverer:” But the Act of Parliament does not *make* him so, or *consider* him as the Discoverer. Here is no Evidence “that the Plaintiff *was* the Discoverer.” And *another* Person must have been the *Witness*: For, the Plaintiff could not be the Witness himself.

It is not to be presumed, *without* any Evidence at all of it, “ that
“ the Plaintiff in the Action was the Discoverer.”

His Lordship asked, if the Case of *Gardiner v. Horne* was ever determined. [This Question was not expressly answered. But Mr. *Mansfield* said, he understood, that the Court of C. B. there looked upon the Plaintiff in the Action as being conclusively the *Discoverer*: Which Mr. *Dunning* doubted.]

Mr. Justice ASTON owned he had some Difficulty, whether this Act of Parliament ought not to receive the same Construction as the Acts relating to Coiners, Horse-stealers, &c. (In which Opinion Lord MANSFIELD acquiesced; and added that it meant to encourage Offenders to discover each other.)

Here, it is not stated, *who* was the first Discoverer: Therefore the Case is not completely stated.

Mr. Justice WILLES—*This* Cause was the *first* tried. There was *no Other* Person who claimed to be first Discoverer. 2000*l.* is a great Penalty: And there can be no harm in taking Time to consider it.

LORD MANSFIELD said, he had no Notion that the Act meant to consider the Plaintiff as *conclusively* the Discoverer. It is impossible to give an Opinion upon this Question, without considering him in that Light: For, the Verdict is given for the Plaintiff.

Mr. Justice ASTON doubted whether it would not be the better Method to move for a new Trial. And

Mr. Justice YATES said there was *no other* Method. The producing the Record does not prove “ That the Plaintiff is *conclusively* the Discoverer.” This stands as if it had been pleaded, and demurred to. We can not give Judgment for the Defendant. But here, the Evidence was not carried on: It is only *primâ facie* Evidence.

The COURT were of Opinion, That there ought to be a *new Trial*.

Mr. *Mansfield* did not desire a new Trial, *if* the Court would be of Opinion, “ That upon the *present* Evidence, there was *not* sufficient to support the Verdict. But being told he must make his Election; he desired Time to consider. And now,

Mr. *Dunning* Mr. *Wallace* agreed that it should go down again to Trial, without Payment of Costs.

The End of *Michaelmas* Term 1769. 10 G. 3.

IN the Vacation after this *Michaelmas* Term 10 G. 3. and a little before the Beginning of *Hilary* Term 1770, the following Events happened.

1770, January 17th.

LORD CAMDEN resigned the Great Seal: Which, after its having been offered to LORD MANSFIELD, who declined to accept it, (as he had before done, when the Custody of it was given to Sir *Robert Henley*),

17th. The Honourable Mr. *Charles Yorke* received, the same Evening, from the Hands of his Majesty.

20th. He died. Whereupon, the next Day,

21st. It was delivered to Mr. Baron *Smythe*, Mr. Justice BATHURST, and Mr. Justice ASTON; to hold in Commission.

22d. Sir *Fletcher Norton* was chosen Speaker of the House of Commons, in the Room of Sir *John Cust*; who, having been taken ill a few Days before, had requested the House to choofe another Speaker: Soon after which Choice, viz. on the 25th of January, Sir *John Cust* died.

25th.

Hilary

Hilary Term,

10 Geo. 3. B. R. 1770.

Rex *versus* Inhabitants of *that Part* of the Parish of Weston under Penyard, which lies in the County of Gloucester. Wednesday
24th January
1770.

MR. Griffith Price and Mr. Bearcroft shewed Cause, on behalf of the Prosecutor, against a Rule which had been obtained by Mr. Selwyn, on the Third Day of last Term, for the Prosecutor to shew Cause why the Judgment against Defendants should not be arrested.

This was an Indictment found in the County of Gloucester, and removed into this Court by *Certiorari*. (It is filed, of Easter Term 8 G. 3. No. 3.)

The Jury present, that there had been from Time immemorial, a certain Common King's Highway leading from the Market Town of *Mitchell-Dean* in the County of Gloucester, towards and unto the Market-Town of *Ross* in the County of Hereford, for Horses, Coaches, &c; and that a certain Part of the said Common Highway, leading from a Place called *Suffont-Poole* to another Place called *Lea-Bailey*, lying in the County of Gloucester, and containing in Length Fourteen Hundred Yards, and in Breadth Ten Yards, situate lying and being in *that Part* of the Parish of *Weston under Penyard* which lies in the County of Gloucester, was on the 11th of July 7 G. 3. ruinous &c; and that the Inhabitants of THAT PART of the Parish of *Weston under Penyard* which lies in the County of Gloucester ought to repair it, &c.

In Hilary Term 9 Geo. 3. John Yem and Thomas James, two of the Inhabitants of *that Part* of the Parish of *Weston under Penyard* which lies in the County of Gloucester, for themselves and the rest of the Inhabitants of *that Part* of the said Parish, &c, plead, that *Part* of the said Parish of *Weston under Penyard* lies in

in the County of *Hereford*, and *other Part* of the said Parish lie in the County of *Gloucester*; and that all the Inhabitants of the said Parish of *Weston* under *Penyard*, as well those Inhabitants of *that Part* of the Parish which lies in the County of *Hereford*, as those Inhabitants of *that Part* of the said Parish which lies in the County of *Gloucester*, from Time whereof the Memory of Man is not to the contrary, have used and been accustomed *jointly* to repair, and still of Right ought *jointly* to repair and amend *that Part* of the said Highway in the said Indictment mentioned and supposed to be ruinous, in Decay, and out of Repair, when and so often as hath been necessary and Occasion required: WITHOUT THIS, "that the Inhabitants of *that Part* of the said Parish of *Weston* under *Penyard* which lies in the County of *Gloucester* ought to repair and amend the said King's Common Highway so in Decay as aforesaid, when and as often as there is Occasion," as by the said Indictment is above alledged. And this they are ready to verify. Wherefore the said *John Yem* and *Thomas James* pray Judgment, if they and the Rest of the Inhabitants of *that Part* of the said Parish of *Weston* under *Penyard* which lies in the County of *Gloucester* ought, *separately* and *exclusive of the Rest* of the Inhabitants of the said Parish, any further to be prosecuted on account of the not repairing or amending the said Highway.

The King's Coroner and Attorney replies (in *Trinity Term* 9 Geo. 3.) That, 'by any Thing by the said Plea above alledged, our Sovereign Lord the King ought not to be barred from prosecuting the said Indictment against the said Inhabitants of *that Part* of the Parish of *Weston* under *Penyard* which lies in the County of *Gloucester*; because, for our Lord the King, he saith, as before, That the Inhabitants of *that Part* of the said Parish of *Weston* under *Penyard* which lies in the County of *Gloucester* ought to repair and amend the said King's Common Highway so in decay as aforesaid, when and as often as there is Occasion. And this, the said Coroner and Attorney of our said Lord the King, for our said Lord the King, prays may be inquired of by the Country: And the said *John Yem* and *Thomas James*, Two of the Inhabitants of *that Part* of the Parish of *Weston* under *Penyard* which lies in the County of *Gloucester*, for themselves and the Rest of the Inhabitants of *that Part* of the said Parish, do so likewise.

This Issue went down to Trial: It was tried before the Lord Chief Baron *Parker*; and a Verdict was found for the King.

Mr. *Selwyn* had moved (on *Wednesday* the 8th of *November* 1769) for the Defendant, in Arrest of Judgment; on the following Objection.

The Indictment concludes, that the Inhabitants of *that Part* of the Parish (lying in *two different Counties*) which lies in *one* of the Counties ought to repair this Road, which is described to lie within *their* County.

The Defendants have pleaded, that the *Parish* lies *Partly* in one County, and *Partly* in the other; and that the *whole Parish* in general ought *JOINTLY* to repair the Road in Question, though it lies within *their* County of *Gloucester*: And they traverse that they themselves are bound, *separately* and *exclusively* of the other Part of the Parish, to repair it.

The Replication pursues the Indictment, and takes Issue upon the Traverse.

But Mr. *Selwyn* insisted, in Arrest of this Judgment, That the *WHOLE Parish*, in general, are, by *Common Law*, bound to repair this Road. Therefore, as the *whole Parish* are liable of *Common Right*, the Indictment ought to have particularly shewn how these Inhabitants of a *Part* only of it *became* liable or bound to this Repair: For want of which, he argued, that the Indictment was a bad one. And he endeavoured to support his Objection upon the Authority of a Case of the King against the Inhabitants of *St. Andrew's Holborn*, concerning the amending of *Leather-Lane*; which lies partly in *London*, and partly in *Middlesex*. This Case, (which was in *Easter Term* 26 C. 2. 1674;) is reported in Four different Books. In 1 *Ventris* 256. it is said, "that if a Parish &c, be indicted for not repairing of a Way within their Precinct, they can not plead *not Guilty*, and give in Evidence; that another, by Prescription or Tenure, ought to repair it: For, *they are chargeable de communi jure*; and if they would discharge themselves by laying it elsewhere, it must be pleaded." In 1 *Mod.* 112. S. C. *Hales* speaks to the same Effect; and says, "that if you will discharge yourself, you must do it by Prescription, or *ratione tenuræ*, and say, that such a one *ratione tenuræ*, or *such Part of the Parish*, hath always used, Time out of Mind &c." In *Freeman* 521. S. C. *Hale* is reported to say, "that the *Parish of Common Right*, ought to repair their Highways: And if they be indicted, and plead not Guilty, they can not give in Evidence, that another Parish or Person, or *Part of that Parish* ought to repair it; nor any Thing else, but that it is in Repair: For, *not Guilty* goes only to that. And if another ought to repair, it should be pleaded *specially*. BUT if a particular Precinct of a Parish, or a particular Person, be indicted for Repair of a Highway, it must be said in the Indictment, HOW THEY COME to be chargeable; viz. either by Prescription, or *ratione tenuræ*." *Keble's*

Account of the same Case, in his 3d Vol. p. 301. is this—On an Indictment of the Inhabitants of *St. Andrew's* in *London*, on Prescription “that they have used to repair *Leather-Lane*, *that Part that is in Middlesex*,” HALE Chief Justice said, that on *not Guilty*, nothing but the Decay is in Question; and if any other Inhabitants use to repair, it must be specially pleaded, and fetched off by another Indictment by the Inhabitants of *London* against *Middlesex*. 2. The Indictment, *as at Common Law*, of the *whole* Parish, makes *both that in London*, and that Part in *Middlesex* contributory: And, to charge the particular Inhabitants in *London* or *Middlesex*, or particular Precinct, the Indictment must be *ratione tenuræ*, or by *Prescription*, and *not de communi jure*, to exempt the Rest of the Parish. *Ex motione Twifden*, for a Day to plead.

From this Case, Mr. Selwyn inferred, that this being an Indictment of only a *Particular Part* of the Parish, and *not of the whole* Parish, it ought to have shewn how that particular Part came to be bound to repair; when the Obligation to repair this Road lay, of *Common Right*, upon the *whole* Parish, and *not* upon any particular Part of it.

Mr. Justice YATES and Mr. Justice ASTON, the only Two Judges then in Court, were not satisfied with this Case, thus imperfectly reported by all these Reporters; and could hardly think, that Lord Chief Justice HALE had said what he was represented to have said. Besides which, they observed, that the present Indictment is *not* against a Precinct of a Parish, or a particular Part a Parish lying all in the same County: But it is against the *whole* of the Parish, which lies within *that County* where the Indictment is found.

However, They gave him a RULE to shew CAUSE.

THE Gentlemen who now shewed Cause, said that Parish and Vill were synonymus. *Cro. Jac.* 263. *Sir William Wrey v. Vesper.* 1 *Mod.* 250. *Addison v. Sir John Otway.* 1 *Inst.* 125.

It appears by the Case of *Mile-End* within the Parish of *Stebonheth*, in *Style* 163, that though a Hamlet within a Parish can't be charged of *Common Right* to repair a Highway, yet a *Vill* may.

It is impossible for any Common-Law Process directed to the Sheriff of one County, to be enforced by him in *another* County: His Viscountiel Jurisdiction extends no further than his own County. This Parish lies in Two Counties. In the *Mile-End* Case, both Parts of the Parish lay in *Middlesex*.

IT was replied by Mr. *Ashburst* and Mr. *Selwyn*, on behalf of the Defendants, that the Parishes lying in different Counties can not alter the Law. Here, only *Part* of the Parish are indicted, and generally charged as liable, without shewing *how* or *why*. If Parish and Vill are synonymous Terms, then only *Part of the Vill* is indicted: Whereas it ought to be the *whole Vill*. But this Indictment expressly Terms them "*Part of the Parish*." Therefore, upon the Principles of the Common-Law, Judgment ought to be arrested.

LORD MANSFIELD thought, this Case stood clear of all Precedents and Acts of Parliament; and that it was to be determined upon Principles; no Common-Law Case having been produced, where the Parish lay in two different Counties, and only one Part of it generally indicted. There must always have been Obligations upon Parishes, to repair their Highways.

This Part of the Parish here indicted is not a particular Precinct: It is the *whole* of the Parish that lies *within* this County of *Gloucester*; and it might have been laid so. The Indictment must be confined to the County. The old Jurisdiction of Counties was local: They were like different Kingdoms. There was no Jurisdiction out of the County; no Process, out of it. The whole of the Parish that lay within a County was liable to repair the Road lying with the County. Where County-Bridges stand in different Counties, one Part of the Bridge can't stand, without the other Part: And therefore both Counties shall, by Act of Parliament, be contributory. But that is not the Case of Roads.

This Indictment seems reasonable and right; and is, in my Opinion, a *good* One.

His Lordship spoke very slightly of the confused Note of the Case of *St. Andrew's Holborn*, in *Keble* 301.

Mr. Justice YATES concurred with LORD MANSFIELD, that this Indictment was a proper One; and he even added, the *only* proper One that could have been brought.

This is agreeable to the general Obligation that Parishes are under, to repair their Highways. This is the *whole* of the Parish that lies in the County of *Gloucester*: And they are under a general Obligation to repair that Part of the Road which lies in the County of *Gloucester*. Here is no particular Obligation by Prescription, or Tenure, or otherwise: Nor any Thing relating to a Vill, or a particular District. The Indictment of the Inhabitants of *St. Andrew's Holborn* is said by *Keble*,* to have been on

* p. 301. of
Pre- 3 Keble.

Prescription "that they have used to repair *Leather-Lane*, that
"Part that is in *Middlesex*."

As the Parish lies in two Counties, an Indictment against the whole Parish, found in One of the Counties could not have been enforced: One County has no Jurisdiction over the Inhabitants of a distinct County.

Mr. Justice WILLES was of the same Opinion with the Lord Chief Justice and Mr. Justice YATES.

* N. B. Mr.
Justice As-
TON was ab-
sent; being
engaged in

his new Office of One of the Lords Commissioners of the Great Seal.

Per * CUR', unanimously—

RULE DISCHARGED.

Thursday
25th January
1770.

Goodright, on the Demise of Glazier, *versus* Glazier.

THIS Cause had been tried at the *Suffex*-Assizes: Where a Verdict had been given for the Plaintiff, the Heir at Law to the Testator, against the Defendant, who was his Devisee in Two Wills.

It now came before this Court, upon a Motion on the Part of the Defendant for a new Trial: Which was opposed by Mr. *Dunning* (Solicitor-General,) Mr. *Burrell*, and Mr. *Kemp*, on the Part of the Plaintiff; who argued, that *both* Wills were revoked; and, consequently, their Client took as Heir at Law.

The Question turned upon the Revocation of the *first* Will, by making the *Second*.

The Short of the Case was this. The former Will (being a Will of *Lands*) was made in 1757: The second, in 1763. The *former* was never cancelled: The *second* was cancelled by the Testator himself. Both Wills were in the Testator's Custody, at the Time of his Death: The second, cancelled; the first, *uncancelled*.

The Counsel for the Plaintiff, the Heir at Law, argued That the second Will was a complete Instrument, at the Time when it was executed; That it clearly proved the Testator's Intention of revoking the former; And that the Execution of it was as much a Revocation of the former, as if he had thrown the former into the Fire; That the Preservation of it was merely accidental, and
of

of no Consequence; That it had been already totally extinguished, so that it could never revive; That, as it never had been republished, it remained a mere Nullity; And that no subsequent Event could hinder the Execution of the second Will from operating as a Revocation of the former. The second Will was therefore the Testator's only subsisting Will, so long as it remained uncanceled. And when he thought fit to cancel and destroy it, it is manifest that he meant to die intestate, and that his Heir at Law should take. If a Woman makes a Will, and then marries, her prior Will is thereby revoked; and shall remain so, although she should immediately become a Widow. They cited a Case of *Ashburnham and Bradshaw*; and also the Case *ex parte Hellier* 3 *Atkyns* 798. where Sir George Lee gave Sentence "that the Execution of a second Will is a Revocation of a first, though the second be afterwards cancelled; and that the cancelling the second did not set up the first:" Which, they said, was the same Point, only that it was personal Property. Mr. *Dunning* said, he had inquired into that Case: And it was affirmed by the Delegates. They denied the two Cases of * *Eggleston v. Speke*, and † *Onions v. Tyrer*, to be like the present Case. The former is only, "that a second Will shall not revoke a first; if the second is not good in Law, but void." The latter is, that "a second Will, devising Lands to the same Person, and revoking all former Wills; and this second Will subscribed by Three Persons, but not in the Testator's Presence, shall not revoke the former Will, so as to let in the Heir at Law." They insisted, that the Statute of Frauds does not alter any of the old Requisites of Revocation, except in the Cases therein excepted.‡ The same Liberality, they said, ought to prevail in the Revocation of Wills, as in the making of them: And the true Principle of the Cases upon Revocation of Wills, both before and since the Statute of Frauds, is the *Alteration of the Testator's Intention*. 1 *Rolls Abr.* 614, 615, 616.

* Carthew
79. 1 Show.
89. 3 Mod.
259.
† 1 Peerage
Williams,
343.

‡ Vide 29 C.
2. c. 3. sect.
6. and post.
p. 2514.
2515.

Mr. Serjeant *Leigh* was beginning to speak on the other Side; but was prevented by LORD MANSFIELD, as the Case was so plain as to render it unnecessary for the Serjeant to proceed.

HIS LORDSHIP observed, with regard to the Case *ex parte Hellier* in 3 *Atk.* 798. that Mr. *Atkyns* only reports what passed in Chancery. There might be other Circumstances appearing to the Ecclesiastical Court, which might amount to a Revocation of a Will of *personal* Estate.

Here, the Testator has, by *both* Wills, devised the Lands in Question, *to the Defendant*. His cancelling the second is a Declaration "that he does not intend *that* to stand as his Will." Does not that speak, "that his first Will *shall* stand?" If he had

intended to revoke the first Will, when he made the second, it must have operated as a Declaration "that the Defendant should *not* take." But that could not be his Intention; because he devises to the Defendant by *both*.

* Vide ante,
p. 169^o. ac-
cord.

As to Cases of Revocation of Devises of Land, contrary to the Intention of the Testator, (as the Case of The Earl of *Lincoln*, and many more,) they turned upon legal Subtilties. They have been *determined*; and therefore must govern all similar Cases: But none of them are applicable to the present Question.

Here, the Intention of the Testator is plain and clear. A Will is ambulatory till the Death of the Testator. If the Testator lets it stand till he dies, it is his Will: If he does not suffer it to do so, it is *not* his Will. Here, he had two. He has cancelled the second: It has no Effect, no Operation; It is as no Will at all, being cancelled before his Death. But the former, which was never cancelled, stands as his Will.

Mr. Justice YATES concurred with LORD MANSFIELD, for the same Reasons. A Will has no Operation, till the Death of the Testator. This second Will never operated: It was only Intentional. The Testator changed his Intention; and cancelled it. If by making the second, the Testator intended to revoke the former, yet that Revocation was itself revocable: And he has revoked it. In the Case of *Onions v. Tyrer*, there was no Intention to die intestate: And therefore the Heir at Law was not let in. *Hellier's* Case might be rightly determined: There might be *collateral* Evidence of an Intention to revoke. That was a Will of *personal* Estate.

† Vide § 6.

By the Statute of Frauds,† "No Devise in Writing, of *Lands*
" Tenements or Hereditaments, or any Clause thereof, shall be
" revocable, otherwise than by some other Will or Codicil in
" Writing, or other Writing, *declaring the same*; or by burning,
" cancelling, tearing, or obliterating the same, by the Testator
" himself, or in his Presence and by his Directions and Consent:
" But all Devises and Bequests of Lands and Tenements shall *re-*
" *main and continue in force*, until the same be burnt &c; or un-
" less the same be altered by some other Will or Codicil in
" Writing, or other Writing of the Devisor, signed in the Pre-
" sence of Three or Four Witnesses, *declaring the same*." Now
here are none of these Circumstances used in what is pretended
to be a Revocation of this first Will. Therefore the *first* Will
stands good.

Mr. Justice WILLES declared the same Opinion; and gave
the same Reasons; particularly repeating the Clause in the Statute

of Frauds concerning Revocations: Which shewed, he said, that this is no Revocation.

Mr. Justice ASTON was in Chancery, as One of the Lords Commissioners.

LORD MANSFIELD mentioned a Cause at the Delegates, between *Mason v. Limbrey*; where the Testator *Samuel Mason* had made his Will, of his Real and Personal Estate; and properly executed two Duplicates of it: One of which Duplicates he kept in his own Hands; the other he delivered to Mr. *Limbrey*. A little before his Death, he greatly altered and obliterated his own Duplicate; and begun to write over a new Will, but never finished it: Nor did he ever apply to *Limbrey*, to get back his Duplicate. Sentence was given for the Duplicate of the first Will remaining in Mr. *Limbrey's* Hands: For, the imperfect Sketch of the unfinished second Will was no Revocation of the first. He did not mean to die intestate. So, in the Case now before Us; If this second Will is *not* the Testator's Will, it is no Revocation of the first: He did not mean to die without any Will at all.

Note—This Case of *Hide v. Mason* was 25th of November 1734; and is published, from a MS. Report, by Mr. *Viner*, in his 8th Volume, Title “Devise,” p. 140. pl. 17.

THE RULE for a new Trial was made absolute: And it was without Payment of Costs.

Rex *versus* Abraham Head and Four Others, Freeman of Helston. Friday 26th Jan. 1770.

THIS was a Question concerning the Validity of a Corporation-By-Law.

It came before the Court, upon a Motion made (on *Wednesday* the 8th of November 1769) by Mr. *Dunning*, Solicitor-General, on behalf of the Prosecutor, for a Rule upon the Defendants, to shew Cause why Judgment of Ouster should not be entered against them, notwithstanding that all the Issues had been found for them.

He said, it appeared upon the whole Record, “that the Defendants had *not* a good Title:” And in such Case, there shall be Judgment of Ouster against them, although the particular Issues may all be found for them.

This

This Information charges them with usurping the Office of Burgeses and Freemen. They justify under a *By-Law*. This By-Law was made by the Mayor and Aldermen, with the Assent of the Commonalty; and ordains “that the Mayor and Aldermen, “*by themselves and without the Commonalty*, may for the future “elect Burgeses and Freemen:” And they shew that they were elected under it, *by the Mayor and Aldermen only*. Whereas the *Charter* places the Election of them in the Mayor Aldermen AND COMMONALTY. This By-Law was given in Evidence upon the Foot of Usage: And no contrary Usage was shewn. But it is not in the Power of a Corporation, to exclude any One *constituent Part* of their Body, to whom the *Charter* has given the Right of Election: They can’t put it into the Hands of *two* constituent Parts of their Body only, when the *Charter* has placed it in *three*.

The Information set forth, That the Burrough of *Helleston* alias *Hellston* in *Cornwall* is an ancient Burrough; and the Burgeses thereof incorporated by the Name of the *Mayor and Commonalty* of the Burrough of *Helleston* in the County of *Cornwall*; and that within the said Burrough there are and ought to be, and for and during &c, there have been or ought to have been, a Mayor, Four Aldermen, and an indefinite Number of Burgeses and Freemen; and that the Office of a Burges and Freeman is a public Office &c: And that *Abraham Head* late of &c, *William Pasmore*, *Thomas Nicholls*, *John May*, and *John Odgers*, late of &c, on the 1st Day of *January*, 2 G. 3. and from thence continually afterwards, and to the Time of exhibiting this Information, have and Each of them severally hath used and exercised and still do and Each of them doth there severally use and exercise the Office of a Burges and Freeman, without any legal Warrant &c; and claim, without any legal Warrant &c, to be a Burges and Freeman &c.

THE PLEA of the said *Abraham Head*, *William Pasmore*, *Thomas Nicholls*, *John May*, and *John Odgers*, admitted that the said Burrough is an ancient Burrough; and that the Burgeses are One Body Corporate and Politic by the Name of the *Mayor and Commonalty*; and that within the said Burrough there are or ought to be, and for and during &c there have been or ought to have been, a Mayor, Four Aldermen, and an indefinite Number of Burgeses and Freemen; and that the Office of a Burges and Freeman is a public Office &c.

But the said Defendants say, that the Burrough of *Helleston* alias *Hellston* aforesaid is and from Time immemorial had been an ancient Town and Burrough; and that the Lady *Elizabeth* late

Queen &c, by her Letters Patent dated the 26th of *January 27 Regni*, (reciting, "that the Burgesſes and Inhabitants of the ſaid Burrough of *Helleſton*, from Time whereof &c, had had and enjoyed divers Customs &c, as well by Preſcription as by Letters Patents, Charters &c; and alſo, that the Burgesſes and Inhabitants of the ſame Burrough had beſought her to create them into a Body Corporate &c,") taking it for granted, that the ſaid Burrough or Vill was an ancient Burrough and One of her moſt ancient Burroughs within her Dutchy of *Cornwall*," did by her ſaid Letters Patent GRANT, That the ſaid Burrough or Vill of *Helleſton* ſhould be and remain for ever a Free Burrough; and that the Burgesſes of the ſaid Burrough ſhould be *incorporated* by the Name of *Mayor and Commonalty* of the Burrough of *Helleſton*; and did create them a Body Corporate and Politic &c; and that by that Name they ſhould have perpetual Succeſſion, and might have poſſeſs and enjoy &c; and did nominate and conſtitute &c *Peter Collyns*, an honeſt Man and an Inhabitant of the ſaid Burrough, to be the firſt and modern *Mayor*, to execute the ſaid Office until *Sunday* next before the Feaſt of *St. Michael the Archangel* next following, and from thence until another Perſon ſhould be elected and ſworn into that Office; and did Grant to the ſaid Mayor and Commonalty &c, that for ever thereafter, from Time to Time, there ſhould be *Four Men*, of the more diſcreet honeſt and quiet Men &c, to be aiding and aſſiſting to the ſaid Mayor; who ſhould be *Aldermen*, and who, *together with the Mayor*, ſhould be the *Common Council* of the ſaid Borough, *for the MAKING STATUTES &c by them or the Major Part of them, without the Mayor* of the ſame Burrough; and did thereby nominate *J. P. alias R. J. J. alias W. T. P. and P. A.* Inhabitants of the ſaid Burrough, to be the firſt and modern *Four Aldermen* of the ſame Burrough, and to be, upon their Oath, corporally to be taken before the ſaid modern Mayor, the *Common Council* of the ſaid Burrough, *with the ſaid Mayor*; and the ſaid *Mayor and Aldermen for the Time being*, did create the *Common Council*, for ever; and did thereby grant to the ſaid Mayor and Commonalty and their Succeſſors, that the ſaid *Mayor and Commonalty* for the Time being, together with the *Aldermen for the Time being*, or the major Part of them might *elect and admit* ſo many of the more diſcreet honeſt and quiet Men and Inhabitants of the ſame Burrough, to be *Burgesſes and Freemen* thereof, as to them ſhould ſeem fit and convenient: As by the ſaid Letters Patent remaining &c, may appear &c. Which ſaid Letters Patent, on the 1ſt Day of *February* in the ſaid 27th Year of Queen *Elizabeth*, the then Burgesſes of the ſaid Burrough of *Helleſton* accepted; and by Virtue thereof have from thenceforth hitherto been and ſtill are One Body Corporate and Politic &c, by the Name of *Mayor and Commonalty* of &c. And they further ſay, that *after the accepting* the ſaid Letters Patent, and

long before their Election, to wit, on the 2d of *February* 27 *Elizabeth* at &c, the *then* MAYOR AND ALDERMEN of the said Burrough, and then being the Common Council of the said Burrough, WITH THE ASSENT OF THE COMMONALTY of the said Burrough, did make a certain reasonable Statute Act and Ordinance, commonly called a BY-LAW (not now extant in Writing) for the avoiding of popular Confusion in the Election of Burgesses and Freemen of the same Burrough; whereby it was ordained, "That the *Mayor and the Aldermen or the major Part of the said Aldermen* of the same Burrough, for the Time being, by *themselves*, and WITHOUT *the Concurrence or Assistance of the COMMONALTY* of the said Burrough, might and might be able, at all future Times for ever thereafter, to *elect and admit* such and so many of the more discreet, honest and quiet Men, and Inhabitants of the same Burrough, to be BURGESSES AND FREEMEN of the same Burrough, as to them should from Time to Time seem fit and convenient:" To which said BY-LAW the Mayor and Commonalty of the said Burrough of *Helston* have, from the making thereof hitherto, *conformed* themselves; and the same still is *in full Force*, in no wise reversed repealed or annulled.

And the said Defendants further say, that afterwards, to wit, on the 14th of *November* 1749, at the Burrough aforesaid, *John Williams* Esq. then *Mayor*, together with the *major Part of the Aldermen* of the said Burrough, *did elect and admit* them the said Defendants (then and there being of the most discreet honest and quiet Men, and Inhabitants of the said Burrough, to be *Burgesses and Freemen* of the same Burrough: And thereupon, they did, on the same Day and Year last aforesaid, take upon themselves, and Each of them did take upon himself, the Office of a Burgess and Freeman &c; and by reason of the Premises, they and Each of them were, and still are &c; And by that Warrant they and Each of them have and do use exercise and claim &c, as it was and is lawful &c. They conclude with traversing the Usurpation, and praying Judgment.

THE REPLICATION, protesting "that the Flea and Matter contained in it are not sufficient to Bar &c," denies that *Queen Elizabeth* made any such *Letters Patent* as in the Plea is alledged: And Issue is joined thereon. It Denies the *Acceptance* of the Letters Patent, as is alledged in the Plea: And on this, a Second Issue is joined. It Denies the making any such *By-Law*, by the Mayor and Aldermen, and then being the Common Council &c, as by the Plea is alledged: And on this, a Third Issue is joined. It Denies the *Election* of the Defendants to be Burgesses and Freemen, as by the Plea is alledged: And on this, a Fourth Issue is joined. It Denies their *being Burgesses and Freemen*, as by the Plea

is alledged : And on this a Fifth Issue is joined. It Denies their being *Inhabitants* at the Time of their supposed Election; as by the Plea is alledged : And on this, a Sixth Issue is joined.

ALL these Issues were found *for the Defendants*.

Mr. Serjeant *Burland*, Mr. *Morton*, Mr. *Wallace*, Serjeant *Glynn*, and Mr. *Hodgekins* now shewed Cause against this Rule which had been obtained by Mr. *Dunning*.

They insisted, that this is a *good* By-Law, on the *Face of the Plea*. The Prosecutor might have demurred to it, if he had thought fit. He has not demurred : And a Verdict is found for the Defendants.

The Commonalty may give up their own Rights, by a *By-Law*, as well as by accepting a new Charter. Here, they have given up their own Rights, for the sake of Peace, and to prevent popular Confusion. They have only narrowed the Number of *Electors*. No Body is injured. It can affect none but themselves : And they have assented to it. No Violence is done ; because it is by Consent. CONSENT is the Ground upon which it stands : And that *Consent* makes it a *good* By-Law.

They cited the following Cases. The Case of Corporations, 4 Co. 77, 78. to shew that a By-Law which restrains the Number of Electors, may be good : Which was confirmed, as they said, by 4 *Inst.* 48, 49. in all other Cases except that of Electing Burgeses to Parliament. The Case of the Corporation of *Colchester*, 3 *Bullstrode* 71. By *Coke* Chief Justice and the Whole Court, " If there be a popular Election of the Mayor and Aldermen, in Corporation-Towns ; and this happens to breed " a Confusion among them ; this may be altered by their Agreement, and by the common Consent of all, to have their Elections made by a fewer Number ; but not otherwise : But if " by their Charter they are to be elected by them All, then this " is not to be altered but by and with the general Assent of the " whole Town ; and so, by this means, to take away Confusion." They also cited 1 *Salk.* 168. and 1 *Salk.* 190, 191. *Futler v. Palmer.* *Andrews* 119, 241. *The King* against *Castle Jenkins's* Centuries 273. Case 93. *The Carmarthen Case*, *Rex v. Philips*, in *Trinity Term* 1749 ; and the *Maidstone Case*, *Rex v. Spencer*, in *Hilary* 1766 : Both of which last cited Cases may be seen *ante*, Vol. 3. p. 1833 and 1836.

It was replied, by Mr. *Dunning* and Mr. *Thurlow*, on behalf of the Prosecutor, that this By-Law could not be supported.

This

This Corporation consists, by the Charter, of *Three integral Parts*; the Mayor, the Aldermen, the Commonalty. The Charter gives the Right of Electing and Admitting Freemen and Burgesses, to *All Three*. This By-Law, (a non-existing One, inferred only by a Proof from Usage,) *excludes One of the Three integral Parts*, the Commonalty. It contravenes the fundamental Principles of the Constitution: Which it is *not in the Power of the Corporation* to do. They can't exclude an *integral Part* from the Right of Electing, by a By-Law of their own, without the King's Concurrence; even though the whole Body should assent to it. It is not true, "that no Body is interested in this, " but *Themselves*." The *King* and the *Public* are interested. It is not like a private personal Right given to a Man for his own private Benefit; and which he may therefore renounce without Detriment to any One else, or at all affecting any One but himself. Nor is it like those Cases where the Right of Election is given to a *whole Class*, and they consent to be bound by the Acts of a *Part of themselves*, by a *select Number* of their *own* Body. This is not inconsistent with the principles we insist upon; and their Cases prove no more than this, "that where the Right of Election is given to a whole Class of Men, " they may restrain it to a *Part of themselves*." But a Corporation can't change their Constitution, and give themselves a new Mode of Existence. They cannot narrow the Number of those *out of whom* the Election is to be made: Nor can they leave out an *integral Part* of those who are to *elect*; though they may narrow their Number. They cannot superadd Qualifications not mentioned in the Charter, and not connected with the Corporate Character of the Electors. The Crown has given them a Charter: They have accepted it. They must use it, *as* the Crown have given and *as* they have accepted it. They cannot make a By-Law contrary to its Intention. To prove these Positions, they cited the *Maidstone Case*; which is reported *ante*, p. 1827, to 1840, by the Name of *Rex v. Spencer*, and again (a Sort of second Part to it) in this present Volume, p. 2204, to 2208, by the Name of *Rex v. Cutbush*.

As to the *Commonalty's giving up their own Rights* by this By-Law, it was observed by Mr. *Thurlow*, that *their Assent* to this By-Law can have *no Effect* whatsoever: It is null and void; and cannot bind their Successors. The Power of *making By-Laws* is given, by the Charter, to the *Mayor and Aldermen ONLY*: The *Commonalty* have no Authority to interfere at all in that Matter. It is not within *their Province*: They could not be summoned for such a Purpose; nor, if they were summoned, could they do any single Act that could be be Valid, in Relation either to the Making By-Laws, or assenting to or dissenting from them. All their Acts of that Kind would be nugatory, null, and void; as
1
they

they have no Sort of Power to *meddle* therein. Consequently, This By-Law is to be considered as made by the Mayor and Aldermen *alone*: And the Addition of the Words “*with the Assent of the Commonalty*,” makes no Difference, nor carries any real Meaning; because they had no Concern in what was transacted, any more than any other Person, or even an absolute Stranger to the Corporation.

LORD MANSFIELD stopt Mr. *Thurlow*; and said—The *Body at large* had no Power to *make By-Laws*; because that Power is, by the Charter, given to the *Common Council*, consisting of the *Mayor and Aldermen*: And the *Common Council* could not, by a By-Law, take away from the *Body at large* the Right of Election which the Charter had vested in the *whole Body*.

This is exactly the Case of *Maidstone*.*

* Vide ante,
vol. 3. p.
1834, 1837,
1839, 1840.

The whole of the present Case is shortly this. *The Charter of Queen Elizabeth* gave the Power of *making By-Laws*, to the *Mayor and Aldermen*; and granted the Power of *electing Burgeses*, to the Mayor or Aldermen AND COMMONALTY. An Information in Nature of a *Quo Wa ranto* is brought against the Defendants, who plead a By-Law, not now extant in Writing, made by the Mayor and Aldermen, WITH THE ASSENT of the *Commonalty*, “that the Mayor and Aldermen, or the major Part of them, might elect Burgeses and Freemen, WITHOUT the Concurrence or Assistance of the *Commonalty* of the said Burrough:” And they add “which said By-Law the Mayor and Commonalty of the said Burrough have, from the making thereof hitherto, conformed themselves.”

Several Issues were taken upon this By-Law and the Defendants Title under it: Which were all found *for the Defendants*.

But the Prosecutor moved for a Rule to shew Cause “why Judgment of Ouster should not be entered.”

Upon shewing Cause, The Counsel have gone into a very long Argument at the Bar; and great Strefs has been laid upon the Allegation “that the By-Law was made WITH THE ASSENT of the *Commona'ty*.” But the Judgment turns upon a very short and clear Point.

THE † COURT directed that JUDGMENT of OUSTER should be entered. But I had Directions, not to tax any Costs of the Trial.

† Mr. Justice ASTON was absent; sitting in Chancery as One of the Lords Commissioners.

Wednesday
31st January
1770.

Rex *versus* Micklethwayte.

* c. 54.

THE Defendant had been convicted before Five Trustees appointed for putting in Execution the Powers contained in an Act of Parliament made in 32 G. 2.* for repairing and widening the Road from *Dewsbury* to *Ealand* in the West Riding of the County of *York*, of an Offence against that Statute; whereby he forfeited Five Pounds. He appealed to the Quarter-Sessions: And they confirmed the Conviction; *subject to the Opinion of the Court of King's Bench*, upon the Facts stated in the Order of Sessions.

These Orders had been removed hither by *Certiorari*: And the Conviction stood in the Crown-Paper, for Argument.

† Vide ante,
488, 489.

Mr. *Fenton*, for the Prosecution, objected "that the *Certiorari* ought not to have *issued*; the Act of Parliament having expressly excluded the Jurisdiction of this or any other Court of *Westminster-hall*." And upon referring to the Act of Parliament, his Objection appeared to be well founded. He cited the Case of *The King* against *Wakefield and Others*, Hil. 31 G. 2. B. R.* where the Writ of *Certiorari* was superseded, *quia improvidè emanavit*; the Return taken off the File; and the Order remanded.

Mr. *Fearnly*, *contra*, for the Defendant, said, it was by *Consent* of both Sides, that the Sessions had stated the Case specially and referred it to the Opinion of this Court: And after such *Consent*, it was regular and allowable to proceed here.

Mr. *Fenton* denied that there was any such *Consent*: And Mr. *Fearnly* was not able to make it out, to the Satisfaction of the Court.

‡ Mr. Justice
ASTON was
sitting in the
Court of
Chancery.

THE * COURT being of Opinion that they were excluded by the Clause which takes away the *Certiorari*, and that the Jurisdiction was given solely to the Justices of Peace, they made the like Rule as they had done in the Case of *Wakefield and Others*, (*Vol. 1. p. 489*.) namely,

That the Writ of *Certiorari* be superseded, *quia improvidè emanavit*; the Return taken off the File; and the Orders remanded.

Rex

Rex *versus* Willam Rogers, Burgefs of Helfton.

UPON shewing Cause why an Information in Nature of a *Quo Warranto* should not be granted againft the Defendant, to shew by what Authority he claimed to be a Freeman and Burgefs of that Corporation, The Question was Whether this Cafe was or was not *within the Rule and Resolution* fettled and eftablifhed in the *Winchelfea* Causes, (*Vide ante*, 1962, 1963,) of not granting Informations of this Kind, againft Corporators, *after Twenty Years unimpeached Poffeffion* of a Corporate Franchise: But that every Cafe *within Twenty Years* should depend upon its own particular Circumftances.

The Counfel for the Defendant infifted that the Profecutor was too late in his Application; and that the Defendant was intitled to the Benefit of the abovementioned Resolution, “that Twenty Years was the *ne plus ultra*, the utmost Limit, beyond which the Court would not interfere to difturb the peaceable Poffeffion of a Corporate Franchise.”

The FACTS of the prefent Cafe were very fhort and clear. The Defendant was *elected* into the Office, on the 14th of November 1749: The original Motion made againft him, for a Rule to shew Cause why this Information should not be granted, was on the 11th of November 1769; which was *Three Days before* the Expiration of Twenty Years. But the Day for shewing Cause, which was fixed in the Rule, was not till the *Thursday* next after the Octave of *St. Martin*: Which Day carried it *Nine Days beyond* the Expiration of Twenty Years. For, the 11th of November (*St. Martin's Day*) falling on a *Saturday*, its Octave was the 18th, and the *Thursday* next after that Octave was the 23d of November 1769. So that he would have been *above Twenty Years* in unimpeached Poffeffion of his Office, before the Day upon which he was required to shew by what Warrant he claimed it.

LORD MANSFIELD and Mr. Juftice YATES were exceedingly clear, that the abovementioned *Limitation* (of an Application for Leave to file fuch an Information) to the Compafs of Twenty Years, precluded the Court from liftening to the prefent Motion; and that they could not grant fuch Leave, confiftently with the Rule they had laid down, and the true Meaning and Intention of their former Resolution.

LORD MANSFIELD obferved, that this original Motion was not made till fo near the Expiration of the Twenty Years, that

that not only the Rule could not have been made absolute within the limited Time of Twenty Years, allowing a just and reasonable Opportunity of shewing Cause against it; but that it would not be easy even to *serve* the Rule in *Cornwall*, before the Expiration of the limited Time.

Mr. Justice YATES acceded to this Observation; and held, that the Period of the limited Space of Twenty Years was the Day of the Court's granting the Information by making the Rule absolute. Now, in the present Case, the Defendant would have been Twenty Years in quiet Possession of his Office, before any Information could be granted against him by making the original Rule absolute. He did not even consider it as a *Cause in Court*, till the Rule was made absolute for an Information. For, any of his Majesty's Counsel may, without a Licence, be concerned for the Defendant, until such Time as the Information is actually granted: From whence he inferred, that it was not properly a Cause in Court, till the actual Granting of the Information.

Mr. Justice ASTON was not present: He was sitting in Chancery, as One of the Lords Commissioners of the Great Seal.

Mr. Justice WILLES could not, of his own Knowledge, declare what the Intention of the Court was, when they established this Rule of Limitation; as he was not, at that Time, either upon the Bench, or even a Practiser in this Court: But he seemed (though silent) to concur with his Lordship and Mr. Justice YATES.

Mr. *Hodgekins*, One of the Counsel for the Prosecutor, offered an Observation in his Favour, and in answer to the Objection made on the Part of the Defendant. He said, that by the intermediate *Alteration of the Style* there would be a Loss of *Eleven Days* in computing Twenty Years: Which ought to be allowed for. And *if* they were allowed for, then there would be Fourteen Days wanting of Twenty complete Years, at the Time when the original Motion was made on the 11th of *November* 1769; *viz.* Three and Eleven: And Twenty complete Years from the 14th of *November* 1749 would not be expired till the 25th of *November* 1769; before *which* Day, (namely, on the 23d) the Rule might be made absolute, and the Information actually granted.

But LORD MANSFIELD answered, that this was an odious Prosecution; being so exceedingly stale as it appeared to be: And he therefore thought that the Court ought not to enter into such Niceties, in order to support it.

He declared, however, at the same Time, that *if the Defendant* had, by enlarging the original Rule, or by any other *Delay of his own*, carried the Making it absolute beyond the limited Time; he ought not, in *such* Case, to have been permitted to take Advantage of that Delay which he himself had been the Occasion of.

RULE DISCHARGED.

Morley *versus* Vaughan: Or the Case of Vaughan, a Prisoner.

BY the 32 G. 2. c. 28. "for Relief of Debtors with Respect " to the Imprisonment of their Persons," a Debtor charged in Execution for any Sum not exceeding 100*l.* may exhibit a Petition to the Court from whence the Process issued: But he shall give previous *Notice* of it, in Writing, signed with his Name, to all his Creditors, "FOURTEEN Days at least, before " any such Petition shall be presented and received."

This Prisoner (*Vaughan*) having been brought up, a few Days ago, to be discharged upon this Act of Parliament, it appeared that the Notice he had given was only *Thirteen* Days before he exhibited his Petition; unless the first and last Days should be, *both* of them, included: So that it became a Question "Whether " he had given *sufficient* Notice, pursuant to the Directions of the " Act of Parliament."

THE COURT rather inclined to the favourable Side, for the Benefit of the Prisoner and the Furtherance of the kind Intention of the Legislature. However, they thought it proper to inquire how the Court of Common Pleas acted upon the like Occasions; in order to preserve a Consistency between the two Courts. To which End, it was at that Time

ADJOURNED.

This Day, towards the Rising of the Court, and after LORD MANSFIELD, was gone, the Matter was taken up again.

Mr. *Mansfield*, Counsel for the Plaintiff, said that Mr. *Barnes*, Secondary of the Common Pleas, having been consulted, declared it to be the Practice of *that* Court, to require *Fourteen complete* Days Notice; that is to say, excluding only One of the Days.

Mr. Justice YATES observed, that upon Returns to Writs of *Mandamus* and *Scire Facias*, the Rule was "that there must be Fifteen Days between the Teste and Return:" And yet, in Practice, there were only Fourteen; one of the first or last being always included. So upon a *Superfedeas* for want of declaring before the End of two Terms, one of the two Terms is always included. By Analogy, therefore, to these Instances, he thought the Court might, in Favour of Liberty, make the Computation in the present Case so as include one of the Days.

He chose, however, to lay hold of a Circumstance which offered in the present Case; namely, that *above* Fourteen Days Notice had been given in a former Term; though nothing was done upon it, by reason of the Prisoner's not having annexed a Schedule, as he had in Reality no Effects, and had therefore omitted to annex a Schedule in the requisite Form: Upon the Discovery of which Mistake, the Prisoner gave this new Notice; having then only Thirteen Days remaining. Mr. Justice YATES thought this was enough to shew that there was *no Surprise* upon the Plaintiff, nor any Intention of surprizing him: though he acknowledged, that, strictly speaking, *two insufficient Notices* could not amount to *One good One*.

* Mr. Justice
ASTON was
absent (in
Chancery.)

* Mr. Justice WILLES coming into the same Sentiment; and the Plaintiff's Attorney not disputing it;

THE PRISONER WAS DISCHARGED out of Custody, as at MORLEY'S Suit.

Note—This Act of 32 G. 2. c. 28. has twice before been favourably construed for the Relief of Debtors: *viz.* in *Trinity Term* 32, 33 G. 2. *ante*, p. 799, and in *Michaelmas* 33 G. 2. *ante*, p. 901.

Monday 5th
Feb. 1770.

Boddy *versus* Leyland.

MR. John Calendar, a Merchant, came to *justify as Bail*. The Sum he was required to justify in, was 9000*l*: And he regularly justified in that Sum, INCLUSIVE of his landed Property in JAMAICA.

Mr. Mansfield objected to the including his landed Property in *Jamaica*.

Mr. Baker argued, that it ought to be allowed, as a sufficient Security.

Mr.

Mr. Justice YATES and Mr. Justice ASTON (who came into Court to take the Oath of Office as One of the Commissioners of the Great Seal, and afterwards remained upon the Bench,) were the only Two Judges in Court. They thought the Objection a good One; because his landed Property in *Jamaica* is not liable to the Process of this Court. And upon inquiry "whether such an Objection had ever been made," Mr. *Thomas Cooper* Junior recollected such an Objection to have been once made by Mr. *Stowe*; and that the Person was rejected.

THE SAME was therefore done in the present Case.

Rex *versus* John Wilkes, Esq.

Wednesday
7th February
1770.

AS this Cause, in the several Branches of it, came several Times before the Court, it seemed better to reserve a general Account of it till a final Conclusion of the whole, than to report the particular Parts of it disjointedly, in order of Time as they were respectively argued and determined.

In *Michaelmas* Term 1764, the 4th Year of his present Majesty King *George* the Third, SIR FLETCHER NORTON, then his Majesty's *Solicitor-General*, (the Office of Attorney-General being then *vacant*,) exhibited an Information against Mr. *Wilkes*, for having published, and caused to be printed and published a *seditious and scandalous Libel*, (the *North Briton*, No. 45.)

And soon after, he exhibited another Information against him, (the Office of Attorney-General still remaining *vacant*,) for having printed and published, and caused to be printed and published, an *obscene and impious Libel*, (an Essay on Woman, &c.)

Mr. *Wilkes* having pleaded "Not Guilty" to both these Informations, and the Records being made up and sealed, and the Causes * ready for Trial, The Counsel for the Crown thought it expedient to amend them, by striking out the Word "*Purport*," and in its Place inserting the Word "*Tenor*." The proposed Amendments were in all those Parts of the Information where the Charge was that the Libel printed and published by Mr. *Wilkes* contained Matters "*to the PURPORT and Effect following, to wit:*" Which the Counsel for the Crown thought it advisable to alter into Words importing that such Libel contained Matters "*to the TENOR and Effect following, to wit.*"

* They were
tried on the
21st of Feb.
1764.

Sir

Sir *Fletcher Norton* (then become himself *Attorney-General*) directed Mr. *Barlow*, Clerk in Court for the Crown, to apply to a Judge for such an Order; apprehending it (as he afterwards publicly declared) to be a Matter of *Course*.

Mr. *Barlow*, in Pursuance of these Directions, applied to Lord *Mansfield*, for a Summons to shew Cause "why such Amendment should not be made." And his Lordship issued a Summons in each Cause, dated 18th of *February* 1764, for the Defendant's Clerk in Court, Agent, Attorney or Solicitor, to attend him at his House in *Bloomsbury-Square* on *Monday* the 20th of *February* at 8 o'Clock in the Morning; to shew Cause why the Information should not be amended, by striking out the Word "*Purport*," in the several Places where it is mentioned in the said Information, and inserting instead thereof the Word "*Tenor*." N. B. The Summons in the Cause relating to the seditious Libel excepted the first Place—"except in the first Place."

On Notice of this Summons, Mr. *Philips* Agent and Solicitor for Mr. *Wilkes*, and Mr. *Hughes* his Clerk in Court and Attorney for him upon the Record, Both attended his Lordship, at his own House, upon the said 20th of *February* 1764, accordingly, (being now Vacation-Time, and no Court sitting;) and did not object to the proposed Amendment: On the contrary, Mr. *Hughes*, upon being asked as a fair Practicer, candidly acknowledged "that it was amendable;" and Mr. *Philips* acquiesced in it, though he said he could not CONSENT to it. Lord MANSFIELD having, in the Presence of these Gentlemen, consulted and produced many Precedents, and being fully satisfied "that the Amendment might be made, and that it might be made by a single Judge at his House or Chambers," told Mr. *Philips* "that there was no Need of his Consent;" and immediately made the following Order—"Upon hearing the Clerks in Court on both Sides, I do Order that the Information in this Cause be amended; by striking out the Word *Purport* in the several Places where it is mentioned, in the said Information, and by inserting instead thereof the Word *Tenor*. Dated this 20th Day of *February* 1764."

The Orders in both Causes were exactly alike; only that the Words "except in the first Place" were added in that of the Information for the seditious Libel.

Mr. *Wilkes* was at this Time in *France*; whither he had voluntarily retired some Time before, and from whence he did not return

return till towards the Election of Members for the new Parliament, (into which he was afterwards chosen.)

The Trial came on at the appointed Time, and proceeded in the usual Manner; Mr. *Wilkes's* Counsel and Agents *making no Objection* thereto, *nor declining to enter into his Defence*. Verdicts were found against him, upon both Informations: After which, Judgment was duly signed against him, in each Cause; and Writs of Capias were awarded and issued against him, as in ordinary Cases of Convictions upon Informations for Misdemeanours.—Upon his Non-Appearance, the Proceedings were carried on to Proclamation and Exigents: And upon his not appearing on the 5th Time of being exacted, he was, by the Judgment of the Coroners of the County of *Middlesex*, according to the Law and Custom of the Realm, *outlawed*.

On *Wednesday* the 20th of *April* 1768, (being the first Day of *Easter Term* 1768,) soon after the sitting of the Court, and *before any Process* had issued on this Outlawry, Mr. *Wilkes* voluntarily made his Personal Appearance in it; accompanied by Three or Four Friends, who probably meant to become his Bail, in case of his being now admitted to Bail.

He opened with a Speech, which is already in * Print, and therefore needs not to be here repeated. He took Notice, in it, that the *Record was altered*, before the Trial, by LORD MANSFIELD's Order: So that he was *tried upon altered Facts*. This he particularly complained of, as being *unconstitutional and illegal*; and was advised, he said, that it rendered both the Verdicts absolutely void.

* It was printed in the public Papers of the next Day, 21st of April 1768.

Mr. Attorney-General (Mr. *De Grey*) prayed that Mr. *Wilkes* might stand committed; as he had been convicted of printing and publishing one of these Libels, and of publishing the other; and had now avowed himself to be the Person so convicted.

Mr. Serjeant *Glynn*, of Counsel for Mr. *Wilkes*, opposed this. He said, he had several Objections to the *Outlawry*; and that, till last Night, they had expected a Fiat for a Writ of Error: But that, last Night, Mr. Attorney-General declined granting One, because he doubted “Whether it belonged to *his* Office to grant “it,” or “Whether it ought not to be granted by the Lord “Chief Justice.” He said, Mr. Attorney-General did not refuse his Fiat, from any Doubt about the Propriety of the Application for it, or the Sufficiency of the Objections to the Outlawry; but merely from a Doubt “to *whom* it belonged to allow “the Writ of Error.” He said, he would propose some Errors, which he hoped would satisfy the Court that a Writ of Error

ought to be granted. They were of two Sorts: first, *Errors in Fact*; 2dly, *Errors in Law*.

1st. An Error in *Fact* was, "that Mr. *Wilkes* was absent and "out of the Kingdom, at the Time of the Award of the Writ of "Exigent."

2dly. Three Errors in *Law*. First, "That the Sheriff has "returned no Proclamations." It is only said, "that he has obeyed "the Writ:" Whereas he ought to have returned Particulars; that the Court might judge of them. Secondly, It is not stated in the Return of the Exigent, "that Mr. *Wilkes* was exacted in "the County of Middlesex:" Nor is it said to be "at a County-Court." It is only said to be "at his County Court at the "Three Tons in Brook-Street near Holbourne in the County "of Middlesex:" Which is no Allegation "that Brook-street is "in the County of Middlesex." And though it is said "at my "County-Court," yet he might be Sheriff of Two Counties. He cited 2 Roll's Abr. 802. Title "Utlagarie, Error Utlagarie." Thirdly, No Judgment of the Coroner is here stated; But only a mere Fact, "that he was outlawed by the Coroner." In Support of which Objection, he cited 1 Brown's Entries 361. as in Point. He therefore prayed that his Lordship would grant Mr. *Wilkes* an Allowance of his Writ of Error, in order to his getting this erroneous Outlawry reversed. He said, it was improper at this Time to enter into any Litigation about the Validity of the Convictions upon which these Judgments are founded. Mr. *Wilkes*'s present Circumstances under the Outlawry are more Penal than the Convictions themselves. Therefore it is incumbent upon him, first to get rid of the Outlawry. And he prayed that Mr. *Wilkes* might be, in the mean Time, admitted to Bail.

* That Case was an Outlawry for Non-Appearance. I have a Note of it, of my own taking. And there is a Report of it in Fortescue Aland 37 and another in 8 Mod. 177.

Mr. Recorder of London (*Eyre*) on the same Side, enforced what the Serjeant had urged; and observed, that by 4, 5 W. & M. c. 18. § 4. Mr. *Wilkes* was not compellable to appear in Person; but might have appeared by Attorney, and reversed the Outlawry without Bail, (unless otherwise ordered by the Court.) He therefore proposed, that he should either appear by Attorney, to reverse it; or give Bail to prosecute a Writ of Error. And he cited *Earbury's Case* in this Court, in *Easter* and *Trinity* Terms 1723. 9 G. 1 *

very bad in the 1st Edition, but much mended in the late Edition of that Book.

Mr. *Mansfield*, on the same Side, argued that Mr. *Wilkes* was clearly intitled to be admitted to Bail, under this Statute. The Convictions can not at this Time be proceeded upon; as the Sentence of Outlawry is standing out against him. He has done all that is in his Power to do. He appears in Court, and submits

to the Laws of his Country. He has shewn Errors of Weight, in the Outlawry; and has used all Methods to obtain a Writ of Error to be allowed; and prays to be admitted to Bail by the Court, as he must have been by the Sheriff, if he had been taken upon a *Capias utlagatum*.

Mr. *Davenport*, on the same Side, spoke to the same Effect.

Mr. Attorney-General explained the Fact and the Reason of his declining to grant the Fiat for a Writ of Error. He said, that upon the Application made to him on the Part of the Defendant, he directed an Attendance: Which was accordingly had. That he thought the Errors specified to him, to be a sufficient Foundation for a Fiat, in case the Party had been *in Custody*: But he could not find any Precedent for an *Attorney-General's* granting a Fiat when the Party was *not* in Custody. The Writ of Error was not tendered to him, he said, till last Night: And the Court was to sit, this Morning. He was ready to listen to any Method that could have been shewn to be proper: But none was proposed. He added, that he thought Mr. *Wilkes* could not be intitled to his Writ of Error, *till* he should be in Custody. He observed, that this was not an Outlawry for Non-Appearance; but an Outlawry upon and after Conviction.

LORD MANSFIELD—Here are Two Motions made, upon the Defendant's appearing Personally in Court: One, for *Committing* him; the Other, for *Bailing* him.

I am of Opinion against *both* these Motions.

He ought to be brought in *regularly*, upon a *Return* of the *Capias* by the Sheriff. I have no Doubt but that we *might* take Notice of him, upon his voluntary Appearance as the Person outlawed; and Commit or Bail him: But we are not absolutely *bound* to do it, without *some Reason* to excuse the going out of the regular Course.

If the Defendant could shew that the Attorney-General *refused* to take him up and bring him into Court, *in order to prevent* his having this Advantage; or *if* the Attorney-General had in Fact used all Methods to take him up, and he had concealed himself and absconded, and afterwards had come in thus voluntarily, *in order to surprize*; upon either of these, or any other *extraordinary* Ground, we should be bound to interpose, and overlook the Impropriety of the Defendant's *coming*, instead of being *brought*, into Court.

But

But the real Cause of *this* Irregularity is the strongest Argument why we should *not* give Way to a new Mode, liable to Misconstruction, and carrying a bad Appearance. It is notorious, that the Defendant has appeared very publickly: *Why* was he not apprehended?

The Outlawry must certainly be disposed of, *before* you can come at any Thing *else*: The Judgment upon the *Convictions* can not, *at present*, be proceeded upon.

I could wish this Gentleman had been better advised than to have come thus prematurely, with a written Speech, to justify the Crimes of which he stands convicted; and to arraign an Order made by me.

I am very happy in having this Opportunity of explaining my Conduct in making the *Amendment* that has been mentioned. If I was wrong, I should think it more Honourable to acknowledge and rectify any Error that I should have committed, than to justify and defend it. The Application to me was, to amend the Word "Purport" into "Tenor." Mr. *Hughes*, the Clerk in Court for the Defendant, agreed it to be amendable. I recollected a Case of the like Kind, of an Amendment of an Information just before Trial: And, looking for it, I found a Collection of such Cases. After reading One or Two, Mr. *Philips*, Attorney and Agent for the Defendant, was perfectly satisfied, and desired me not to give myself any further Trouble; but said "He *could not* Consent to it." I said, "I did not want a Consent:" I thought myself *bound* to order the Amendment; and *did* so. I had made some such Orders before; and I have made several such Orders since; even in *Quo Warranto* Informations. In this Case, it made no Alteration in the Defendant's Defence. His Counsel never objected to it, nor took any Notice of it. I think it *right* and *usual*, and *as of Course*: Not but that I am open to Conviction, and ready to hear what can be said to shew that it was wrong.

Mr. Justice YATES—If this Amendment was wrong, it will still be open to the Consideration of the Court; although the *proper* Opportunity of objecting to it was *at the Trial*. In the Case of *The King* against *Charlesworth*, an Information for forging a Warrant of Attorney "to acknowledge Satisfaction upon a Judgment" was amended, without Costs (the Prosecutor having been admitted a Pauper,) and without giving the Defendant Leave to plead *de novo*. 2 *Stra.* 871.

As to the two present opposite Motions, one for committing, the other for bailing the Defendant; the same Answer serves for

Both:

Both: "The Court can take no Notice of any Thing but what comes *judicially* before them." We can not take Cognizance of this Matter, in the Method in which it now comes before Us: We can not take *judicial* Notice "that this is the *Person* convicted or outlawed." Mr. Browne's Case in *Dyer* 192. is clear and strong, as to the Outlawry. And as to committing him upon the Convictions, that can't be done whilst the *Outlawry* is subsisting: The Outlawry must first be disposed of, before we proceed upon the Convictions. The Judgment of Outlawry *suspends* all Proceedings upon them. The Judgments on the Convictions would probably be Fine and Imprisonment. But it would be manifest Oppression to set a Fine upon him, when all his Effects stand forfeited to the King already: And he is already liable to Imprisonment upon the Outlawry; from which he can never be freed whilst that stands in Force. There can't be two different Judgments for the same Offence: There can't be Judgment of Outlawry, and Judgment for the Misdemeanour likewise. In the Case of *The King and Queen* against *Tippin*, 1 *W. & M. Salk.* 494. the Defendant was outlawed upon an Information for a Misdemeanour, and fined 5000 *l.* It was moved, on his behalf, that he could not be fined upon the Outlawry; because, in Misdemeanour, the Outlawry does not enure as a Conviction for the Offence, (as it does in Cases of Treason and Felony,) but as a Conviction of the *Contempt* for not answering; which Contempt is punished by the Forfeiture of his Goods and Chattels: And if he might be fined now, he must be fined again, upon the *principal* Judgment. And the **first* was held to be irregular: For, the Outlawry in these Cases is *not* a Conviction; as appears by *Fleta* 42. "*Quamvis Quis pro contumacia et fuga utlagetur, non propter hoc convictus est de facto principali.*" And there is a Case in *Bro. Abr.* Title "*Utlagary*," *pl.* 26. where a Man was outlawed of Felony, and taken by a *Capias utlagatum*, and detained in the King's Bench; and divers Bills were brought against him in Custody of the Marshal: And the Court would not suffer it. For, his Body Lands and Goods are *the King's*; And therefore the Plaintiff can not have the Effect of his Suit against him before the Outlawry: But if he obtains a Pardon, the Plaintiff shall be answered. If the Defendant in the present Case had come in *by Process*, his Identity would have appeared. If he had come in *by Record*, he might have applied to be bailed, either upon the Statute of 4, 5 *W. & M. c.* 18. (if that Statute can be shewn to be applicable to an Outlawry on a *Misdemeanour*,) or under the plenary Power of the Court upon the Circumstances of his Case. But that Statute seems only applicable to *civil* Cases. I mention this, only for the Consideration of the Counsel, when it shall come before the Court. By the 5th Section, the Sheriff may "take Security of the Defendant taken upon a *Capias utlagatum*, in Cases where Bail is required, in *double the Sum* for

* I suspect this Word "*first*" to be an Error of the Press; and that it should be "*Fine*."

“ which Bail is required.” But how can the Sheriff, under the Directions of this Statute, take Bail in *double the Sum*, in a *Criminal* Case? How can the Sheriff *know* what the Fine *will be*? Or why should the Sum of the *Fine* be doubled? The Statute seems to relate only to *civil* Cases, and to mean “ double the *Debt*.”

The Defendant ought, in my Opinion, to have come hither in a *regular* Way: But as the Matter now stands, upon this voluntary Appearance, without Return of Process or any Matter of Record whatsoever, the Court, can neither commit him nor bail him.

Mr. Justice ASTON—I think there is but One Question: And I shall keep to that. It is “ Whether he shall be committed ” The Attorney-General prays us to commit a Man *as an Outlaw*, against whom he himself would not issue Process of Outlawry; though there does not appear to be any particular Circumstances to prevent his issuing such Process. The Officers of the Crown might have exercised their Power by proper Process: And then he would have been in Custody. But they have not chosen to do so: And he remains as much at his Liberty, as he was before he came into Court. The Motion to commit him seems unnecessary: And I shall not, at present, take Notice of any other Question; he not being at all in Custody.

Mr. Justice WILLES—There has been, for some Time, a Judgment of Outlawry against the Defendant, who is not an absconding Person. The Attorney-General has not thought proper to issue Process against him upon it. And now he comes into Court *gratis*, voluntarily, not by any Return of Process, or any Matter of Record. We can not take any Notice at all of him; nor can we know, *judicially*, “ that he is the Man.” I don’t see why the Attorney-General should demand of the Court to commit the Defendant upon this Outlawry, when he himself has long suffered him to go at large, without any Attempt to take him up, or even issuing Process against him.

NOTHING was taken by either of the two Motions; namely, the Attorney-General’s, “ that the Defendant “ might be committed;” or his own Counsel’s, “ that “ he might be bailed.”

On *Wednesday* the 27th of *April* 1768, (a Week after the former Transaction,) Mr. *Wilkes* having this Morning surrendered himself to the Sheriff of *Middlesex* upon a *Capias utlagatum* which had been since the last Motion issued against him, and being now in the Sheriff’s Custody, was *brought* into Court by the said Sheriff, upon the Return of a *Habeas Corpus* directed to him for that Purpose.

Purpose. In the mean Time, Mr. Attorney-General had granted his Fiat for a Writ of Error: Which he did immediately upon receiving an Assurance that Mr. *Wilkes* was in actual Custody upon the *Capias utlagatum*. The Return to the *Habeas Corpus* being read in Court, it appeared that the Defendant was charged with two Outlawries; viz. one on each Conviction for the respective Misdemeanours before mentioned. A Writ of Error in each Cause was delivered into Court.

The Outlawries, and the Writs of Error, and the Assignment of Errors, were exactly alike in both Causes: It will therefore be sufficient to specify only One of each Sort.

The material Part of the Outlawry, on which the Question turned, was this. The Sheriff returned the Writ of Exigent executed and indorsed as follows—"By Virtue of this Writ to me directed, at my County Court held at the House known by the Sign of the Three Tuns in *Brook-street near Holborn in the County of Middlesex*, the 12th Day of *July* in the Fourth Year of the Reign of our present Sovereign Lord *George the Third* now King of *Great Britain &c*, the within named *John Wilkes* was the first Time exacted, and did not appear." It goes on in the same Manner, till the *quinto exactus*; viz. "at my County Court held at the same Place the 9th Day of *August* in the Year aforesaid, the said *John Wilkes* was a second Time exacted; and did not appear:" And so, in the same Words, only changing the Days, to the 5th inclusive. Therefore by the Judgment of *Edward Umfreville Esq.* and *Thomas Philips Gent.* his Majesty's Coroners of the County of *Middlesex*, the said *John Wilkes*, according to the Laws and Customs of this Realm, is outlawed.

The Writ of Error was *verbatim* as follows—Of *Easter Term* Writ of Error.
1768, 8 G. 3. OUR LORD THE KING hath sent to his Justices appointed to hold Pleas before him his Writ closed in these Words (that is to say) *George the Third* by the Grace of God of *Great Britain, France, and Ireland* King Defender of the Faith &c. To our Justices appointed to hold Pleas before us Greeting forasmuch as in the Record and Process, as also in the Publication of an Outlawry against *John Wilkes* late of *Westminster*, in the County of *Middlesex* Esquire, on a certain Information against the said *John Wilkes*, for printing and publishing a certain Libel or Composition, intituled *An Essay on Woman*; whereof the said *John Wilkes* is impeached, and thereupon by a Jury of the County is convicted, as it is said, manifest Error hath intervened, to the great Damage of the said *John Wilkes*, as by his Complaint we are informed. We, willing that the said Error (if any be) be duly amended, and full and speedy Justice done to the said *John Wilkes*

Wilkes in this behalf, do Command you, that if the said Outlawry be returned before us as hath been said: Then inspecting the said Record and Process, you Cause further to be done therein for annulling the said Outlawry as of right, and according to the Law and Custom of *England*, shall be meet to be done. Witness Ourself at *Westminster*, the Twenty-Seventh Day of *April*, in the Eighth Year of Our Reign.

Assignment
of Error.

AND hereupon the said *John Wilkes* comes in his proper Person, and says, that in the Record and Process, and also in the Publication of the aforesaid Outlawry, there is manifest Error, in this that there is *no sufficient Information* filed or exhibited against the said *John Wilkes*, whereon to ground the Process of the Outlawry aforesaid: By reason whereof, the said Outlawry is void and of no Effect or Force whatsoever. There is also Error in this, that *no public Proclamation* whatsoever is mentioned to have been made at any open County Court, or at any General Quarter-Sessions of the Peace whatsoever, or at the Door of any Parish Church where the said *John Wilkes* was an Inhabitant, according to the Exigency of the said Writ of *Capias cum Proclamatione*: Therefore in that, there is manifest Error. There is also Error in this, That it is not shewn, nor does it appear by the Return of the Sheriff of *Middlesex*, that the Sheriff of *Middlesex* did Cause to be exacted the said *John Wilkes* in the said County of *Middlesex*, from County Court to County Court, until he was outlawed according to the Law and Custom of *England*, as the said Sheriff by the said Writ of Exigent is commanded; and that it is not shewn nor does it appear by the Return of the Sheriff of *Middlesex*, that the said *John Wilkes* was a *first, second, third, fourth and fifth Time* exacted at the County Court of the County of *Middlesex*, as by the Law of the Land he ought to have been before he was outlawed: Therefore in that, there is manifest Error.—There is also Error in this, that in the Record and Process aforesaid, and in the Publication of the Outlawry aforesaid, it is *no where expressly shewn* that the Place called BROOK-STREET (if any such there be) where the several County Courts are supposed to have been held, at which the said *John Wilkes* is said to have been exacted, IS IN THE COUNTY OF MIDDLESEX, or in any or what other County. Therefore in that, there is manifest Error. There is also Error in this, that it does not appear that *any Judgment of Outlawry* was given or pronounced against the said *John Wilkes*; or, if any such Judgment was given or pronounced, in *what Form* the same was so given or pronounced; as it ought to have done, in order that the Legality and Propriety of the said Judgment might have been seen and examined: But in the Record and Process aforesaid, and in the Publication of the Outlawry aforesaid, *Reference and Relation only* are had to some Judgment not shewn or expressed, but supposed to have been before given against the said

John Wilkes. Therefore in *that*, there is manifest Error. Wherefore the said *John Wilkes* prays that the Outlawry aforesaid, for the Errors aforesaid and other Errors appearing in the Record and Process aforesaid, may be reversed and held for nothing; and that he may be restored to the Common Law, and to all which he hath lost by Occasion of the Outlawry aforesaid &c.—And *William De Grey* Esquire, now Attorney-General of our present Sovereign Lord the King, present here in Court in his proper Person, having heard the Matters aforesaid above assigned for Error, for our said Lord the King saith, that neither in the Record and Process aforesaid, nor in the Publication of the aforesaid Outlawry, is there any Error: And he prays that the Court of our said Lord the King now here may proceed to the Examination as well of the Record and Process aforesaid, as of the Matters aforesaid above assigned for Error; and that the Outlawry aforesaid may in all Things be affirmed. Joinder in Error.

LORD MANSFIELD—Let the Writs of Error be allowed.

HIS LORDSHIP then asked the Attorney-General, “to what Prison he prayed that the Defendant might be committed.”

Mr. Attorney-General answered—“To the Marshal.”

LORD MANSFIELD—Let him be committed to the Marshal.

Mr. Serjeant *Glynn* moved that he might be admitted to Bail, • Vide § 4. on 4 & 5 W. & M. c. 18.* which, he said, extended to Cases of Misdemeanour. He was supported by Mr. Recorder of London, Mr. Mansfield, and Mr. Davenport.

They urged the Spirit Scope and Design of this Statute, as well as the Words of it, as Arguments to prove that it extended to Misdemeanours; and that the Preamble and enacting Part of it do, Both of them, apply to Mr. *Wilkes's* Case: And they said, that even if the Words were doubtfull, the Construction of them ought to be such as would be most favourable to Liberty. But these Words are express: They include *all* Causes, except Treason and Felony. “For the more easy and speedy Reversing of Outlawries in the Court of King’s Bench, Be it enacted that no Person or Persons whatsoever who are or shall be outlawed in the said Court, for *any Cause Matter or Thing whatsoever*, (Treason and Felony *only* excepted,) shall be compelled to come in Person into, or appear in Person in the said Court, to reverse such Outlawry; but shall or may appear by Attorney and reverse the same, except where special Bail shall be ordered by the said Court.” Cases of Misdemeanour are within

the same Mischief as Civil Cases: And it extends to Outlawries after Conviction of Misdemeanours, as well as to Outlawries upon mesne Process. If the Question should take a long Time in discussing, the Defendant may be actually punished by an Imprisonment upon the Outlawry, though it should be at last reversed; or still more unjustly, in case it should afterwards appear that no Punishment ought to be inflicted upon the Convictions themselves. In civil Cases, a Pardon is of Course, upon paying the Debt and Costs: But a Defendant outlawed upon mesne Process for a Misdemeanour has no such Opportunity of getting rid of the Outlawry. He ought to have an Opportunity of putting himself in a Condition of being amenable to the Justice of his Country. Though some of the Expressions in this Statute may seem more applicable to civil Cases, yet there are general Words sufficient to take in criminal Misdemeanours. They mentioned Sir *John Read's Case*, and that of *Matthias Earbury* in 1723.

* Vide § 2.

Mr. Attorney-General (Mr. *De Grey*,) Sir *Fletcher Norton*, and Mr. *Morton*, on the other Side, argued that this Statute relates only to *civil* Cases; and not to criminal Misdemeanours. The Expressions of it relate to civil Property. It can relate only to such Cases where a Defendant can appear by Attorney. The Preamble* says "Whereas divers Persons are prosecuted in the said Court of King's Bench, to Outlawries for Debts, Trespases, or other Misdemeanours; and there is no Reversing such Outlawries but by the personal Appearance of the Persons outlawed: So that the Persons arrested upon such Outlawries, if poor, lie in Prison till their Deaths; but if able, it costs them very dear, to reverse the same Outlawries." The former of these Words relate to Property: The latter, to Actions for malicious Prosecutions and such like. The whole relates only to *civil* Suits. And as to *Earbury's Case*, they said it was neither a direct Determination, nor any Authority in the present Case.

Serjeant *Glynn* replied, that "Trespases" include all other Actions not arising *ex Contractu*: And "Misdemeanours" must mean *Offences*. "All Causes, Matters, and Things," certainly include criminal Offences and Misdemeanours. And the Statute speaks of Outlawries in general. It is not reasonable, that the Defendant should undergo the Penalty of a Contempt for withdrawing from Justice, when the very Validity of the Outlawry itself is in Question. And *Earbury's Case*, though it was not an Outlawry after Conviction (as this is,) yet clearly proves "that this Act does relate to Misdemeanours:" For, the Judges were all of that Opinion.

LORD MANSFIELD—God forbid that the Defendant should not be allowed the Benefit of every Advantage he is intitled to by Law!

It is to be considered, *how* he is in Custody.

After Conviction, if he had been present in Court, he might have been committed: If not present, he might have been taken by a *Capias*.

It is, indeed, in the Discretion of the Court, to bail a Person so circumstanced.

But *Discretion*, when applied to a Court of Justice, means *sound Discretion guided by Law*. It must be governed by Rule, not by Humour: It must not be arbitrary, vague, and fanciful; but legal and regular.

This Defendant was not present, when convicted. He afterwards withdrew from Justice, and was outlawed: And a *Capias utlagatum* has now issued; and he is in Custody upon it.

If a person convicted be taken upon a *Capias pro Fine*, he is liable to be committed, unless the Prosecutor Consents to his being bailed. This is the common Course of Proceeding: though it is usual to admit to Bail, upon the Prosecutor's consenting to it. In the Case of the Journeymen Taylors, and again in that of the Weavers, the Defendants were by Consent bailed, and by Consent were not to appear till called upon. But I do not remember any Case where such a Person has been bailed *without* Consent. When a Person so convicted is committed, such Commitment shall be taken into Consideration by the Court when they come to pronounce their Sentence upon him, and shall go as *Part* of his Punishment.

Here, the Defendant is in Custody *under* the Conviction: For, he is in Custody upon the *Capias utlagatum*, which issued upon his Conviction.

Now, whatever Doubts there may be about what *is* within the Act of Parliament of the 4 & 5 W. & M. c. 18. it is most certain that a Person convicted of a Misdemeanour is *not* within it; because his Case is *not a bailable Case*. Nothing therefore can be clearer, than that such a Person is not within an Act of Parliament that relates only to bailable Cases. This Act relates to Cases where no special Bail is required, and to Cases where special Bail is required:* And the Sheriff is directed what to do in ei-
either

* Vide § 5.

ther Case. Where the Case isailable, the Defendant is to be discharged upon the Security-Bond. But even in *civil* Actions, he could not be bailed, where he was notailable: He is only to be put into the same Condition as if he had not been outlawed at all. If the Outlawry was after Judgment in Debt, or any other civil Action, and the Defendant was *notailable* before the Outlawry, the Act did not make such Defendantailable, who was not so before the Outlawry. I am clear, that this Case is *not* within the Act.

Mr. Justice YATES was also clear in the same Opinion. It is said, "that Misdemeanours of *all* Kinds are within the
 " Vide § 2. " Words of this Act, as well as within the Scope and Meaning
 " of it" But Misdemeanours are here " connected with *Debts* and *Trespasses*; which are Descriptions of *civil* Actions: And so may the Word "*Misdemeanour*" be. This Act might, in the general Words of the Preamble, have a View to Actions of Conspiracy, Deceit, or popular Actions upon Penal Statutes; (on which an Outlawry was given by 21 *Jas. 1. c. 4.*) And taking the Whole of the Act together, there can be no Doubt about it: For, it must be construed of those Cases where the Clauses of the Act are *practicable*; Which, in the present Case, they are *not*. A Conviction in a *criminal* Case can not be within this Act. The Sheriff is directed by it, "to take Security of the Person
 " outlawed, in the Penalty of double the Sum for which special
 " Bail is required." But the Sheriff can't take Bail of a Person after his being *convicted of a Crime*. The Sheriff can't form his own Idea of the *Offence*, or settle a *Sum* wherein he should take the Bail of such a Person: Nor can he require Bail in *double* the Fine, or any Thing more than what the Fine shall be fixed at; which is uncertain and future. The concluding Words of the Security-Bond, "and to do and perform such Things as shall be
 " required by the said Court," mean putting in Bail to a new Action, pleading within a limited Time, putting the Plaintiff in the same Condition, and such like Matters. And it should be considered, how the Law stood in civil Cases, *before* this Act of Parliament; and that no Bail could then be taken on a *Capias utlagatum*. Vide 13 *C. 2. stat. 2. c. 2. § 4.*

What I have been saying, may throw *some Light* upon this Act of Parliament. But I confine my Opinion, to its being an Outlawry *after Conviction in a criminal* Case: which can not be a Case within this Act of Parliament.

If a Defendant is taken upon a *Capias pro fine* (or *pro redemptione*;) it is an *Execution*; and no *Sheriff* can take Bail of him: It is a *Favour*, if the *Court* does it. By 5 *E. 3. c. 12.* no Pardon for an Outlawry shall be granted, till the Chancellor is certified that the Plaintiff is satisfied of his Damages. In a *criminal*

Case, if the Party be convicted, and a *Capias ad Satisfaciendum* issues, and he is taken upon it, he is in Execution, to make Satisfaction; and the Sheriff can never foretell, before the Court have given the final Judgment, *what* that Satisfaction is to be, on which he should admit the Defendant to Bail, on the *Capias utlagatum*: He has nothing to direct himself by. No Clause of this Act can be put in Execution, on an Outlawry upon a *Conviction in a criminal Case*. Therefore I am of Opinion, that the present Case is *not* within it.

Mr. Justice ASTON—I am of the same Opinion. I think, this Act of Parliament relates only to *civil* Actions: This is evidently the true Spirit of it. It can't be imagined, that the Act can mean to allow of a Defendant's appearing by Attorney, in Cases where the Defendant is obliged to appear personally and can't appear by Attorney at all: Neither can it extend to taking Bail in Cases not bailable. But surely it can not extend to Cases of criminal Misdemeanours, *after Conviction*; because, in such Cases, a Defendant is not intitled to be bailed at all. Outlawries after Conviction are very different from the Case of Outlawries for Non-Appearance upon *mesne* Process. After Conviction, there is no Case where it has been holden that the Defendant has a *Right* to be admitted to Bail. In an Outlawry after Conviction for Misdemeanour, no Sheriff could take Bail: And consequently this Act could not have any such Case in View, or be meant to extend to it.

Mr. Justice WILLES—It is clear that the Defendant has no *Right* to demand being admitted to Bail. This is an Outlawry *after Conviction*. If it should be granted that he is intitled to be bailed upon the *Outlawry*, yet as he stands convicted of the Crime, he must be committed upon the *Conviction*. This Statute is indeed as obscure a One as any in the Statute-Book: It is difficult to ascertain its true Meaning. Therefore I don't choose to give any direct Opinion about its *Extent*; unless it should become absolutely necessary for me to do so. As the present Case arises upon an Outlawry *after Conviction*, it is clearly *not* a Case within this Act of Parliament. In Treason and Felony, Outlawries were Convictions of the Fact: And therefore they are particularly excepted out of this Act. But Outlawries in Cases of Misdemeanour are not Convictions of the Fact: Yet after actual Conviction of a Misdemeanour, the Defendant is not intitled to Bail; whether he be or be not outlawed. Even in a *civil* Action, a Person outlawed *after Judgment* could not have a Pardon, till Payment of the Debt. In the present Case, it would be merely nugatory, to discharge the Defendant upon giving Bail to prosecute his Writ of Error upon the Outlawry, when we must immediately commit him upon the Conviction. How can the Sher-

riff know, at the Time of the Defendant's being taken upon the *Capias utlagatum*, whether the Court will at all *admit of special Bail*, or not? Or if they should, how shall the Sheriff know in *what Sum* it shall be? Or, if he should be fined, what will be the *Amount* of his Fine? Clearly, an Outlawry *after Conviction* of a Misdemeanour is *not* within this Act; whatever else may be within it.

THE COURT having thus declared their unanimous Opinion "that Mr. *Wilkes*, under his present Circumstances of "standing convicted of a criminal Misdemeanour, had no *Right* "to demand being admitted to Bail, under this Act of Parli-
"ment;"

HIS COUNSEL moved that he might be bailed, upon the Foot of the *general Discretion* which the Court would exercise, of bailing or committing a Person convicted of a Misdemeanour, according to the particular Circumstances of his Case: Which they alledged to be sufficient, in this Gentleman's Case, to induce the Court to permit him to remain at large, under proper Bail. Public Justice was not intended, they said, nor at all likely to be evaded. He had always been amenable to Justice: He now surrendered voluntarily. Indeed, little Care had ever been taken to apprehend him. He always appeared publicly upon the Hustings, both in *London* and *Middlesex*; and he is Member of Parliament for the latter County.

LORD MANSFIELD—I have said, "that I knew no Case "where a Person convicted of a Misdemeanour has been admit-
"ted to Bail without *Consent* of the Prosecutor." If any Gentleman knows any such Case, I should be glad to be informed of it: I know of none. We can not therefore do it, if the Attorney-General does *not* consent. For, we must act alike in all Cases of like Nature: And what we do now, ought to be agreeable to former Precedents, and will become a Precedent in future Cases of a like Kind.

THE COURT declining to Bail him *without* the Consent of the Attorney-General as prosecuting for the Crown, he was

COMMITTED to the MARSHAL.

His Counsel then moved for a Rule to bring him up to Morrow, to assign Errors. Which was GRANTED.

There were two Rules. The former was this. "The Defendant being brought here into Court, in Custody of the Sheriff of the County of *Middlesex*, by Virtue of a Writ of *Capias utlagatum*;

“ *utlagatum*, IT IS ORDERED, upon the Motion of Mr. Attorney-General, that he said Defendant be now committed to the Custody of the Marshal of the Marshalsea of this Court, to be by him kept in safe Custody until he shall be from thence discharged by due Course of Law. And the said Defendant now here in Court producing a Writ of Error, and praying Oyer of the Record, IT IS ORDERED by this Court, that the said Writ of Error be allowed. On the Motion of Mr. Attorney-General.”

The other Rule “ that the Marshal or his Deputy bring the Defendant up to Morrow, to assign Errors,” was a distinct Rule; and was taken upon the Motion of one of the Defendant’s Counsel.

On *Wednesday* the 4th of *May* 1768, (a Week after making the last mentioned Rule,) The Defendant having assigned Errors upon the Record of the Outlawry, and the Crown having joined in Error;* (All which was, by Consent on both Sides, privately transacted between the Agents, without actually bringing Mr. *Wilkes* into Court;)

* See the Joinder in Error, ante p. 1537. at the End of the Assignment of Errors.

Mr. *Davenport* moved to make the Joinder in Error a *Concilium*: And *Saturday* next was agreed upon as the Day on which it was to be argued.

Accordingly, on *Saturday* the 7th of *May* 1768, it was argued, by Serjeant *Glynn* on the Part of the Defendant, and Mr. *Thurlow* on the Part of the Crown. It was very well argued on both Sides: But it would draw this Report out into an insufferable Length, if the Particulars of it should be here inserted.

The great and capital Error that the Serjeant insisted upon, was the Insufficiency of the Return in not shewing that the Defendant had been five Times exacted from County-Court to County-Court, till he was outlawed, as the Law directs, and the Writ requires. He argued that this ought to appear certainly and precisely upon the Sheriff’s Return; That Outlawries are odious; and that the Court will intend nothing in Support of so cruel a Proceeding, but, on the contrary, listen to the least Objection of Error in it. And here, the first Exaction does not appear to have been made *in the County of Middlesex*; nor any of the subsequent Ones, which are said to have been at the same Place with the first. The Words “ *near Holborn* in the County of *Middlesex*” do not import its being in the County. Besides, the Time and Place of the 2d, 3d, 4th and 5th Exactions ought to have been particularly specified and described; and not by *Reference* only to the first. Moreover, the Sheriff ought to have stated the

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Proclamations explicitly and particularly, and the particular Manner and Circumstances of them. He also made a Question “Whether an Outlawry *lies* upon an *Information*.” And he concluded with an Objection to the Information, as not being properly exhibited; being exhibited by his Majesty’s *Solicitor-General*, without taking any Notice of the Vacancy of the Office of *Attorney-General*: Whereas the *Attorney-General* is the known and proper Officer of the Crown for this Purpose; and the *Solicitor-General* has *no such Right*.

He cited a great Number of Cases and Precedents, in Support of his Objections.

Mr. *Thurlow* defended the Regularity of the whole Proceeding, by Reason, Argument, and Practice: And he also cited a great Number of Cases and Precedents, to support his Arguments and Allegations.

To which Mr. Serjeant *Glynn* having replied; and the Counsel for the Defendant having declared “that they did *not* desire a “second Argument;”

THE COURT said that the very great Number and Variety of Authorities and Precedents that had been produced and very ably urged on both Sides, deserved and would require their mature Consideration; and directed Copies of the Records cited on both Sides to be laid before them; or at least One Copy of each Record, which they would deliver over from One to Another.

On *Saturday* the 14th of *May* 1768, (a Week after the before-mentioned Argument,) after LORD MANSFIELD and Mr. Justice YATES were gone,

Mr. *Davenport* moved for a Rule to bring the Defendant upon *Monday*, in order to be *bailed*: But he had no Affidavit of any particular Circumstances to induce the Court to grant such a Rule.

Mr. Justice ASTON did not see, he said, how the Court could bail him, without any particular Circumstances being laid before them, when they had already and so lately determined, after a full Hearing of Counsel on both Sides, “that he was *in Execution* upon the Outlawry *after Conviction* of Misdemeanours, and was *not admissible* to Bail.” He would not therefore, after Two of the Four Judges were gone away, make such a Rule as was prayed: But Mr. *Davenport* might move it again, if he pleased, on *Monday* Morning at the sitting of the Court; and that would allow Time enough for the Defendant’s being brought
I up

up the same Day, to be bailed, if the Court should think it a reasonable Motion.

Mr. Justice WILLES was of the same Sentiments with Mr. Justice ASTON; and agreed to Mr. *Davenport's* having Leave to move it at the sitting of the Court on *Monday*.

Upon *Monday* the 16th of *May* 1768, the Court being then full,

Mr. *Davenport* accordingly renewed his Motion. He could only urge, that there were but two Grounds of Imprisonment: One, for *Security*; the other, for *Punishment*. The former failed in the present Case; because Mr. *Wilkes* had always voluntarily surrendered: The latter failed, because it was premature; For, the Case was not yet ripe for Judgment upon the Conviction; and the Validity of the Outlawry was at present doubtful.

Mr. *Davenport*, upon being asked by LORD MANSFIELD “Whether he had given Notice to the Attorney-General, of this Motion,” owned that he had not.

LORD MANSFIELD—However, it can't prevail; because the Defendant is in Custody *after Conviction*: Which is a Custody *in Execution*. It is not a Custody for Security only; but goes in *Part of the Punishment*, and will be taken into Consideration, upon the final Judgment: And so we told you before.* It was so in *Lookup's* Case, and in the Case of a *Welch* Clergyman. * Vide ante, p. 2539.

A Defendant in Execution upon an Outlawry after Conviction of a Misdemeanour, in Crown Prosecutions, can't be admitted to Bail *without the Consent* of the Attorney-General.

If the Court had been of Opinion, upon the last Argument, to *reverse the Outlawry*, yet the Defendant must have continued in Custody *upon the Conviction*.

Errors upon Outlawries have seldom been solemnly argued. This Writ of Error has been solemnly and exceedingly well argued: And the Matter deserves to be seriously considered. What is determined upon solemn Argument establishes the Law, and makes a Precedent for future Cases: Which is not the Case of Questions agreed by Consent of Parties, or never litigated. *This will be a Precedent.*

The Court, in all Cases (without regarding who is the particular Defendant,) leans to the Reversal of Outlawries; because the Punishment of the Outlawry is often greater than the Punishment of the Offence itself. Here, the Defendant had the Merit of coming in voluntarily; not being brought in by Process

and in Custody. But the Court can't *make* Errors; nor reverse for Errors which do *not exist*, or which they *can not see*: They must be satisfied, that there *are* Errors. If the Court had been satisfied on any one Error assigned, they would have reversed the Outlawry for that Error. We did, several of us, when we came into Court, seem to think that the *Want of Proclamations* was a Flaw: But my Brother YATES doubted "Whether *Proclamations were at all necessary* in such a Proceeding as this." I wish that the Precedents and Acts of Parliament may be looked into, to see "whether *Process of Outlawry* will lie upon *Informations for Misdemeanours*;" as well as to see "whether *Proclamations* are necessary or not, upon *Process of Outlawry after Convictions* for Misdemeanours." I desire that the Council will apply themselves to search into this Point, "Whether *Process of Outlawry* will *at all* lie upon *Informations for Misdemeanours*." And, as many Precedents have been already cited and produced, I desire also that the Precedents may be left with us, for our Perusal and Consideration.

Mr. Justice YATES—I should have thought that what was said by the Court upon the former Argument, would have been sufficient to have spared the present Motion. The Matter was then largely and very well argued; and the Court explained their Sentiments very fully at that Time: Their Opinion was, "that the Defendant being *in Execution*, he could *not* be bailed, *without Consent* of the Attorney-General on the Part of the Crown." To Bail him upon the *mere Assignment* of Errors, would be *Prejudging* upon the Errors: It would *presuppose* "that they were *fatal*." He is at present *in Execution*; and can't be taken out of Execution, without Consent of the Attorney-General on behalf of the Crown.

But since this Matter is again brought upon the Tapis, it gives me an Opportunity of suggesting my own Doubts. If Proclamations are *necessary*, I should think this Return to be clearly bad: But if Proclamations are not necessary, it is then immaterial when, or where, or how they were made: As to what has been said about the Expression "at *my County-Court*" not being determinate, because he might be Sheriff of *two Counties**—there are two Authorities which either were not mentioned at the Bar, or (at least) were not fully stated. One of them is 1 *Ventris* 108. where an Outlawry was reversed for that the Proclamations were returned to be "*ad Comitatum meum tent. apud* such a Place "*in Comp. prædict;*" and not said "*pro Comitatu:*" For, anciently one Sheriff had two or three Counties, and might hold the Court in One County for Another. The other of these Cases is in 2 *Roll's Reports* 52. *Robert Alder's Case*; who was outlawed for Murder: And it was moved for Error, that the Sheriff returned "*ad Comitatum meum tentum apud D. in le County de*" "Nor-

* Vide ante
2530 and
2535.

“*Northumberland*,” and did not say “*Comitat. meum Northumbriae tentum, &c.*” And this was holden to be Error, by the Court; according to the Case in 6 H. 4. where it is returned “*ad Com. meum Somersett tentum.*” And therefore it was holden erroneous: For, One may be Sheriff of *Surry* and *Sussex*, and also of *Huntingtonshire* and *Cambridgeshire*. But this is not possible in the Case of the Sheriff of *Middlesex*. The Sheriffs of *London* have been immemorially the Sheriff of *Middlesex*: Therefore he could not have two Counties. But I should always incline to favor Errors assigned in Outlawry; because it is more just and Right, that Judgment should be given upon the Conviction for the Offence. Therefore, my Doubt being against the Errors assigned, I should be unwilling that more regard should be paid to it, than it shall appear strictly to deserve: And I would not have proposed it, if I had not thought it incumbent upon me to communicate it, since it has occurred to me, and seems to me to have more Weight than perhaps it might appear to Others to have.

But my Lord's Doubt is a very material one—“Whether the offence charged in the Information is *such* a Crime as will warrant an Outlawry.”

The 18 Ed. 3. Stat. 1. c. 1.* has negative Words in it, in the printed Edition of the Statutes; though it is said not to be so in the Parliament-Roll. At Common-Law, Outlawry lies only for Treason and Felony, as I apprehend. Therefore the Court will be glad of hearing the Arguments at the Bar, to assist their Inquiry in this Doubt.

Mr. Justice ASTON.—The Opinion of the World ought not to weigh at all with the Court in forming their Opinion upon the Validity of the Errors assigned upon this Outlawry. If one flat decisive Objection had clearly appeared, the Court would have immediately given their Opinion, upon the first Argument. I was not satisfied, myself, that the *minor* Objections had sufficient Force in them: And as to the *greater* Ones, the Counsel for the Defendant seemed to me to be too sanguine and too much Attached to their own Opinions, when they declined the Offer of a further Argument, when the Court wished to be further informed by hearing it argued again. But this Doubt which my Lord has mentioned, “Whether Process of Outlawry will lie for the Crimes charged in these Informations,” is a very material One, and ought to be well considered. It may be necessary to look into *Bracton* and other Books; and the Statutes of 18 E. 3. St. 1. c. 1. and St 2. c. 5. and 1 E. 1. c. 20. and a Case in the Year-book of 35 H. 6. fo. c.². pl. 9. “that Process of Outlawry did not lie; because the Action was

“not

“ not for a Tort supposed to be done *vi et armis*.” It may be a doubt “ Whether Process of Outlawry lies on Informations of this kind, for Offences which though expressed to be done *vi et armis*, are *not really* done with *actual* Force.” The 18 *Ed.* 3. *Stat.* 2. *c.* 5. says “ that no Exigent shall go, where a Man is indicted of Trespas, if it be not against the Peace, or of things contained in 18 *E.* 3. *Stat.* 1.” And though the Words “ *nemy des autres*” are not to be found in the Parliament-Roll, yet they are in several Manuscript Copies. These things deserve to be maturely considered.

It is proper also to inquire into the Practice and Precedents ; and to see whether they have been uniform and concomitant. Trespas in Parks may be effectually done, without actual Force.

The Court will not keep back their Opinion, without having sufficient Ground for Doubting, and a Necessity of taking Time to satisfy their Doubts : On the other hand, they will not give their Opinions over-hastily and prematurely, merely to gratify the Humors or Passions of Mankind.

Mr. Justice WILLES concurred that the Defendant was *not*ailable ; being *in Execution* upon the Outlawry after Conviction. He thought, with Mr. Justice *Aston*, that the Defendant's Counsel were in the wrong when they declined a second Argument, which might have given the Court further Light. He expressed his Inclination towards the Reversal of Outlawries, on Account of the Severity of the Judgment upon them, which sometimes exceeded what would be the Punishment upon the Conviction itself.

For the Reasons above particularized,

Mr. *Davenport* took Nothing by this Motion.

On *Wednesday* 8th of *June* 1768, (being the Sixth Day of *Trinity* Term 8 *G.* 3.) Mr. Attorney-General and Other Counsel for the Crown were further heard. But the Counsel for the Defendant rested their Case upon the former Argument.

LORD MANSFIELD expressed himself to the following Effect.

GREAT Pains have been taken, and great Searches have been made, since the last Argument ; not only (as I see now) by Mr. Attorney-General and Those he has employed, but by *SOME of Us*. I say “ *Some of Us*” ; because I cannot, with Truth, assume the Merit to *Myself* : The Load of *other* Business which lay upon me,

me, made it impossible. But from the able Assistance of Those who have taken the Trouble to make Searches and to collect Materials, I think I am now thoroughly Master of a Subject which I am not at all ashamed to say I knew very little of before: And I never give a judicial Opinion upon any Point, until I think I am Master of every material Argument and Authority relative to it. It is not only a Justice due to the Crown and the Party, in every Criminal Cause where Doubts arise, to weigh well the Grounds and Reasons of the Judgment; but it is of great Consequence, to explain them with Accuracy and Precision, in open Court; especially if the Questions be of a general Tendency, and upon Topics never before fully considered and settled; that the Criminal Law of the Land may be certain and known.

OUTLAWRY is a very important Part of that Law. Yet it is no Wonder, that the Forms and Method of Proceeding are so little attended to, and so little understood: For, this is perhaps the first Occasion where any Question of Law, upon a Writ of Error to reverse an Outlawry in a *Criminal* Case, ever underwent a serious Litigation.

Outlawry in *civil* Actions is considered as in the nature of Civil Process, to compell an Appearance to the Suit; or, if after Judgment, to procure Satisfaction. The Forfeiture, though nominally to the King, yet in Truth goes to the Plaintiff, towards Payment of his Demand. If the Outlaw appears, pays all the Costs, puts in sufficient Bail, and does every thing he can to put the Plaintiff in as good a Condition as he would have been in originally; Or if, after Judgment, the Outlaw pays the Debt and Costs; the Court reverses the Outlawry upon Motion, *without* any Writ of Error. The *Form* of the Reversal always is, “For the Errors *assigned* and *other* Errors *appearing upon the Record*”: Although there is, in Truth, *no* Error at all.

Flight, in *Criminal* Cases, is itself a Crime. If an innocent Man flies for Treason or Felony, he forfeits all his Goods and Chattels. Outlawry, in a *capital* Case, is as a *Conviction* for the Crime: And many Men who never were tried have been executed upon the Outlawry.

In *Misdemeanors*, Outlawry is generally a more severe Punishment than would be inflicted for the Crime of which the Outlaw stands accused or convicted. It is a Forfeiture of his Goods and Chattels and all the Profits of his Real Estate; and perpetual Imprisonment, with many Incapacities. If it is erroneous, it cannot be reversed without a Writ of Error.

* 1 Vernon
170.
Crawle v.
Crawle.
† Vid. 1 Vern.
175.
in the Rioters
Case.

Till the 3d of Queen *Ann*, a Writ of Error in any *Criminal Case* was held to be merely *ex gratia*. Lord Keeper lays it down *
“ that a Writ of Error in a *Criminal Matter* was *ex gratia Regis*,
“ in *all Cases*”; and said† “ He had a Collection of several Cases
“ out of the Old Books of the Law, that were given him by
“ Lord Chief Justice *Hales*, which shew that Writs of Error in
“ criminal Cases are *not* grantable *ex debito justitiæ*, but *ex gratia*
“ *Regis*: And in such a Case, a Man ought to make Application
“ to the King; And he will then refer it to his Counsel;
“ And if they certify that there is Error, the King will not
“ deny a Writ of Error.” It never was granted, except when
the King, from Justice, where there really was Error, or from
Favour, though there was no Error, was *willing* the Outlawry
should be reversed. After a Writ of Error granted, the Attor-
ney-General never made any Opposition: Because, either he had
certified “ there was Error,” and then he could not argue against
his own Certificate; Or the Crown meant to shew Favour, and
then he had Orders “ not to oppose.” The King, who alone
was concerned as the Prosecutor, and who had the absolute
Power of Pardon, being *willing* that the Outlawry should be
reversed, This Court reversed upon very *slight and trivial* Ob-
jections, which could not have prevailed if any Opposition had
been made, or if the Precedent had been of Consequence. The
Form of Reversal, “for the Errors assigned *and other Errors*
“ appearing upon Record,” delivered the Court from the Necess-
sity of *specifying* any; And they might think themselves well
warranted to reverse, upon the tacite or express Consent of the
King, where he alone was concerned to oppose; though there
really was no Error at all: And, as the King had the Power to
refuse a Writ of Error, the Precedent was of *no Consequence*.

* v. the Ails-
bury Case.

But in the 3d of Queen *Ann*, * Ten of the Judges were of
Opinion “ that in *all Cases under* Treason and Felony, a Writ
“ of Error was *not merely of Grace*; but *ought* to be granted.”
Price and *Smith* were of a contrary Opinion, “ that a Writ of
“ Error was of *Grace only*, in *ALL criminal Cases*.” The Ten
did not mean “ that it was a Writ of *Course*”; but that, “ where
“ there was *probable Error*, it *ought not to be denied*.”

It cannot issue *now*, without a *Fiat* from the Attorney-
General; who always examines whether it be sought merely for
Delay, or upon a probable Error.

* 9 Geo. 1.
Vid. ante, p.
2530.

In the Case of the *King* against *Earbury*, * the Opinion of the
Court was taken, before the Attorney-General granted his *Fiat*
for a Writ of Error. In the present Case, the Attorney-General
refused his *Fiat*, while the Defendant was out of Custody.

This

This Opinion in the 3d of Queen *Ann* has made a great Alteration as to Outlawries in Criminal Cases *under* Treason and Felony. In a *Misdemeanor*, If there be *probable Cause*, it *ought not to be denied*: This Court would *order* the Attorney-General to grant his Fiat. But be the Error ever so manifest in *Treason* or *Felony*, the King's Pleasure to deny the Writ is *conclusive*. Lord *Muskerry*, the Son and Heir of the Earl of *Clanclarty*, Petitioned for a Writ of Error, to reverse his Father's Outlawry, because his Father was a Prisoner in the Tower of *London* during the whole Time of the Proceedings against him. The Fact was verified beyond Doubt, by Entries from the Books of the Tower, and by the Affidavit of the Duchess of *Marlborough*. The late Lord Chief Justice *Willes*, then Attorney-General, reported the Writ to be *merely of Grace*: And, upon political Reasons, it was absolutely refused; And the Outlawry stands.

A Writ of Error being as a Matter of Right, where there is Error in the Outlawry; Since the 3d of Queen *Ann*, in all Crimes under Treason and Felony, "WHAT is an Error" became an *important Question*: which was of *no* Consequence, before. Since that Time, this Court has not given Way to *trivial* Objections, though admitted by the Attorney-General. In 1708, Lord *Griffin* was brought into this Court upon an Outlawry for High Treason: And upon the Prayer of the Solicitor-General, (there being then no Attorney-General,) a Rule was made for his Execution. He was reprieved, from time to time, till his Death. His Grandson and Heir, from the Grace and Favour of King *George* the first, obtained a Writ of Error. Sir *Philip Yorke*, then Attorney-General, came into Court, and said He had a Sign Manual "to *confess the Errors* and consent to the Reversal." The Court told him "His *Confessing* an Error in *Law* would not "do: THEY *must judge* it to be an Error; And *their Judg-* "ment would be a Precedent. But the Plaintiff in Error might "assign an Error in *Fact*; which, by proper Authority, he "might confess." Accordingly, the Plaintiff assigned an Error in Fact, *viz.* "that the Place of his Grandfather's Residence "was in the County of *Northampton*; whereas he had been "Outlawed in *London*." The Attorney-General confessed the Fact: Whereupon, the Outlawry was reversed*. SINCE the 3d * *Hil. 13.* of Queen *Ann*, no Question of Law has been *litigated*, upon *G. 1.* a Writ of Error to reverse an Outlawry; no Criminal Outlawry has been reversed upon a *trivial* Objection: No Case, since that time, has been found, of *either* kind.

OUTLAWRY is an essential Part of the Criminal Law. The Rules and Method of Proceeding are wisely calculated, to prevent Ignorance and Surprize. The Consequences are made severe, because the Offence is heinous; and it imports the State, that

that no Man should fly from the Laws and Justice of his Country. This Court is bound to pronounce the Law as they think it is; Always leaning to the favourable Side, where they doubt: For, so says the Law. It is as much a Breach of Duty, to reverse a good, as it would be to affirm a bad Outlawry. The Mischief goes farther than an unrighteous Sentence in the particular Case. For, to reverse without an Error, is to abolish that Part of the Law. And therefore Serjeant *Glynn* admitted that Criminal Outlawries were not to be reversed of Course: An Error must be found.

In a Matter where the Consequence may be so penal to the Defendant in this particular Case; where the Grounds of the Judgment must be so important to a very essential Part of the Criminal Law, never before brought adversely in Question, and therefore lying under great Obscurity and Confusion; I feel Myself extremely obliged (and I think the Public obliged) to Those who, in the short Time taken for Consideration, have searched the Subject to the Bottom. From the Materials with which I have been furnished, I think Myself sufficiently instructed, to form an Opinion: And I will declare the Grounds and Reasons of that Opinion which I have formed, to this great and numerous Audience, with as much Accuracy and Precision as I can, to prevent Misapprehension.

There are two Sorts of Error which have been assigned and argued.

1st. The first Sort are Errors which give Rise to *Questions of Law*, and to *Real Arguments*.

2d. The second are Criticisms upon *Words* and *Syllables* in the Return.

Of the first Sort, Two are assigned.—

1st. That there is *no sufficient Information* filed or exhibited against the Defendant, whereon to *ground the Process of Outlawry*.

2d. That *no public Proclamation* whatsoever is mentioned to have been made at any open Court, or at any General Quarter-Sessions of the Peace whatsoever; or at the Doors of any Parish-Church where the said Defendant was an Inhabitant; according to the Exigency of the said Writ of *Capias cum Proclamations*.

UNDER the first Error assigned, three Objections have been made.—

1st. That the Information is by the *Solicitor-General*, and not the *Attorney-General*.

2d. That an Outlawry does *not lie* upon an *Information*.

3d. That though it may lie upon an *Information*, Yet it does not lie for *such an Offence* as is prosecuted in either of *these Cafes*.

First—The Information is by the *Solicitor-General*.

If this Objection is founded, it will equally hold upon a Motion in Arrest of Judgment. But, I believe, None of Us, from the Beginning, ever entertained the least Doubt concerning it. An Information for a Misdemeanor is the King's Suit. The Title of the Cause is "The King against the Defendant:" The Oath, at the Trial, to the Jurors and the Witnesses, is "between the King and the Defendant." As a Subject sues by Attorney, so does the King; with a little Variation of Form, from Decency: Instead of saying "The King sues by—", it is said "—sues for the King;" And yet, "*Coram Domino Rege venit * Dominus Rex per Attornatum suum, et inde producit*" * 2 Lev. 82. "*Sectam*," was held to be good. (Hale Chief Justice said, it † Keble 127. was but an unmannerly Way of declaring for the King.) The † Rastal's Entr. 655.^b The Attorney is answerable, if he acts without Authority; And upon Complaint by the Party whose Name he has falsely used, the Court would punish him, and set aside the Proceedings: But while the Principal avows him, neither the Adverse Party nor the Court can dispute his Authority. The Coroner of this Court prosecutes Informations for the King, as his Attorney. The Form of the Proclamation at Criminal Trials is a strong Proof that anciently the King's Serjeant might prosecute for the King. When there did not exist such an Officer as Solicitor-General, the King's Serjeant or his Attorney, or other that would sue for the King, should be received to aver against the Testimony of the Parties Imprisonment, where the Outlawry was pronounced at the King's Suit. ‡ There are many Entries in Rastal, † which shew that at the Common Law Others than the Attorney-General have sued for the King; Or, in other Words, the King has sued by Others as his Attornies. Serjeant Glynn cited a manuscript Treatise concerning the Star-Chamber; of which, Mr. *Filmer* has a Copy: The Original is in the Museum ||. The Author's Name is preserved in a Note written in this Present-Book, at the Beginning, by the Lord-Keeper

• Fol 84.
and 85.

Fol. 85.

Finch, as follows — “ This Treatise was compiled by *William Hudson* of *Gray's Inn* Esquire, One very much practiced and of great Experience in the Star-Chamber, and my very Affectionate Friend. His Son and Heir, Mr. *Christopher Hudson*, (whose Hand-writing this Book is,) after his Father's Death, gave it to me. 19 December 1635. *J. Finch*.” The whole Passage should be taken together; and is in these * Words—“ It remaineth that I shall, in the next place, treat of the King's Ordinary Suits: Which are of two Sorts;—either by his Attorney, informing of himself, or by other Mens Relations, and by the King's Almoner; the One being in Criminal Causes, the other in Civil. For the King's Attorney, I have known it much questioned Whether any other of the King's Counsell may not inform for the King, as well as the Attorney-General. And it is true, that in *Easter Term 8 Henry 8*. it is ordered that the King's Solicitor shall not prosecute any further the Merchants of the *Stiliard*, till it were otherwise ordered by the Council: And the same Term, the Solicitor was commanded to sue out Process against some which acquitted One *Blase* of a Rape. So that it seemeth, that Others of the King's Counsel did prosecute Causes for the King, as well as the King's Attorney. But in 1 & 2 *James* the 1st it was resolved by the Court, that it belongeth to the Place of the Attorney. And Serjeant *Heale*, the King's Serjeant, putting in a Bill against Sir *John Luson*, was denied that Privilege. For, if a Bill be put in by the King's Counsell as for the King, there are no Costs to be paid to the Defendant, nor Fees for the Prosecution: But in this Case, Serjeant *Heale's* Bill was dismissed with 30 *l.* Costs; it continuing in Prosecution not above two Terms.” It is astonishing how any other Law-Officer of the King could claim, as an *Official Right*, to be the King's Attorney in all Suits which he should think fit to bring in the King's Name. The very Constitution of an Attorney-General is decisive against it. He might stop every Suit brought by Another. And therefore the Council did very right, as between the King's Law-Officers, to overrule Serjeant *Heale*: But they did not mean, that the King Himself, for special Reasons, might not appoint Another to act as his Attorney. In that Reign, afterwards, *Yelverton* was suspended, and the Solicitor appointed to act. Suppose the Attorney-General personally the Defendant: There must be Another to sue for the King. Suppose the Attorney-General out of the Realm; or under a Disability from Sickness: Suppose the Office of Attorney-General vacant. When it is, The Business, (which cannot stand still,) must devolve upon Another of the King's Counsel: And there is Nothing so certain, as that the whole Business and Authority of the Attorney devolves upon the Solicitor-General. I am satisfied, that if the matter was traced, the two Precedents in *Easter Term 8 Henry 8*. mentioned by Mr. *Hudson*, were during the Vacancy of the Attorney's Office. It is impossible the Council could, in the
same

same Term, order the Solicitor-General to stop One public Prosecution and commence another, if there had been an Attorney-General. As far back as the Memory of the Vacancies of the Attorney's Office has led to a Search, Precedents have been found of Informations filed by the Solicitor-General, in Chancery, and on the Law-Side of the Exchequer. In this Court, the Information against the Earl of *Devonshire* * was prosecuted * 3 Jac. 2. by the Solicitor-General: And though the Enormity of the Fine set, and the Revolution of Government which immediately followed, made this Case the Subject of much Animadversion and just Censure; "The Solicitor-General having prosecuted," was never objected. There are Precedents of Replying, Demurring, Taking Issue, Praying Judgment or Award of Execution, by the Solicitor-General, during the Vacancy of the Other Office. We all know, from our own Experience, that upon every Vacancy which We remember of the Attorney's Place, his Office has been executed by the Solicitor-General. But it is said, "The Information ought to have *suggested* that the Office "of Attorney was vacant." Many of the Precedents do not suggest it: And there can be no Occasion. The Attorney-General is a great Officer of the Law and of this Court. The Court take Notice when the Office is vacant; and by Whom it is filled, when full. They give Credit to the Solicitor-General, when he sues as Attorney for the King, "that he *has Authority*." He does it at his Peril. In this Case, before the Defendant pleaded, the Solicitor-General was made Attorney, and in that Capacity brought into Court the Information he had filed as Solicitor. If an Objection could lie to his Authority as Solicitor, the only Question would be, "From what Time the Information should be considered as "commenced: From the filing by the Solicitor; or the bringing into Court by the Attorney." And that could be of no Consequence, but in respect of the Time when the Defendant ought to plead. But he has pleaded to the Information brought in by the Attorney-General; And been tried. In every Light and in every View, this Objection is groundless: Nothing has been offered to support it, but Serjeant *Heale's* Case. Upon so plain a Point, I certainly should not have said so much, but that the Objection also goes in Arrest of Judgment, and therefore may be argued again. The Counsel are apprized of my Reasons: And if they should think their Objection tenable, I am open to Conviction.

Second Objection under the first Error Assigned—"That an "Outlawry does *not lie* upon an *Information*."

The Counsel for the Defendant supported this Objection, *two* Ways. First, They said, The Books were silent on this Head: And the *Statute of Additions* mentions only that "in Original "Writs of Personal Actions, Appeals, and *Indictments*, in which "the Exigent shall be awarded, &c. &c." * But an *Information* * Vid. 1 H. 15 c. 5. § 1.

is not therein mentioned. Secondly, They said, that from the *Nature of the Process* in an Information, the *Exigent* was not awardable. For, the Proceeding by Information in this Court is similar to the Star-Chamber Precedents: And in such Proceedings, they did not award a *Capias*, but a *Subpœna*. That here, the antecedent Process is by Summons of *Attachment*, not by *Capias*: And consequently, if there is no *Capias* to introduce the Process of Exigent, it can not lie in this Case. Serjeant Glynn admitted, as a Point beyond all Doubt, “that Informations of “this kind were competent, in this Court, at the *Common-Law*.” No Lawyer ever doubted of it: No Lawyer would seriously argue against it. So that Sir *Bartholomew Shower* had no Opportunity to deliver the Argument he has printed.* Informations here neither derive their Being, nor the Form of Proceeding upon them, from the Star-Chamber; but from the Common-Law of the Land, and the Usage and Practice of this Court where they are exhibited. Although Informations are not mentioned in the Statute of Additions, yet the same Requisites of Certainty and Precision must be in an Information, as in an Indictment.† *Presentment* is not mentioned in this Statute. And yet, on a *Presentment* before the Coroner, “that *French* was *Felo de se*,” (which was certified into the King’s Bench,) “and that certain of *French*’s “Goods were in the Possession of *J. S.*” Process issued against *J. S.* until he was outlawed. And upon Error brought “for “that there was not any Addition given to the said *J. S.* “in the *Presentment* upon which he was outlawed,” it was at first doubted “Whether upon that *Presentment* Process of Outlawry did lie:” And *Ive*, Clerk of the Crown-Office, said to the Court “that such Process in such Case did lie; and that he “could shew Five Hundred Precedents of it.” And, secondly, it was moved “if this Outlawry ought to be reversed for Default “of Addition.” But it was agreed by the whole Court, that, as to this Purpose, the *Presentment* should be accounted in Law as an Indictment.‡ To an Information in Nature of a *Quo Warranto*, to shew by what Authority the Defendant claimed to be a Burgees of *Grampound*, the Defendant pleaded in Abatement, for want of proper Addition; the Information styling him “Labourer,” whereas he was Clothier: And this Plea was moved to be set aside, on the Ground “that an Addition was not necessary.” The Court refused to set it aside on that Ground: But they found another, the Want of a proper Affidavit to verify the Plea.§ There seems as good Ground to say, upon the Foot of Precedents and Construction of the Statute of Additions, “that Process of Outlawry lies, and Addition is requisite in an “*Information*,” as in the *Presentment* in *Frenche’s Case*. As to the other Argument from the *Nature* of the Process—There was no Authority or Precedent cited or produced, to prove the Assertion. On the contrary, there are many Precedents where the Process

* 1 Shower
106. Rex v.
Berchet et al.
Pryn’s Case,
5 Mod. 459.

† 2 Hawkins
P. C. 260,
261.

‡ *Frenche’s*.
Case, Mich.
26 Eliz. 2
Leonard 200.

§ The King
against Par-
dew, H. 15
G. 2. 1741.

Process was by *Capias*; and the Exigent followed: Some, as in the present Case; though most are before Conviction. But “that a *Capias* does lie, in Process upon these Informations,” I take to be as old as their Existence. If not, how could there have been such a Number of Outlawries upon Informations; and some, of ancient Date? All these Records are so many Authorities to support this Process; which are not, after so great a Length of unquestioned Usage, to be now impeached.* And it is observable on the 18 *Edw. 3. §. 1.* that it not only clearly relates to a Proceeding before Judgment; but it gives the Exigent, if the Party is not brought in on an *Attachment* or *Distress*. However, there is no need to resort to that kind of Reasoning; when Usage supports the *Capias*, in the present Case, as the Common Process upon these Occasions. * 5 Mod. 463. 464.

Third Objection under the first Error assigned—“That Outlawry does not lie, from the *Nature of the Offence*.”

This Objection was slightly touched by Mr. Serjeant Glynn; but struck us, at first, as a Point fit to be considered: And I mentioned to the Bar, “that it might be proper to look into it.” The Doubt was, “whether the Offence charged in either of these Informations was such as rendered the Person accused of such Crime liable to the Process of Outlawry, either at *Common-Law* or by any *Statute*.” In *Coke Littleton 128.* it is said “that in the Reign of King *Alfred*, and till a good while after the Conquest, no Man could be outlawed but for Felony; the Punishment whereof was Death: But after, in *Bracton’s* Time and somewhat before, Process of Outlawry was ordained to lie in all Actions that were *Quare vi et armis*, which *Bracton* calls *Delicta*, for there the King shall have a Fine.” The 18 *Edw. 3. §. 1.* declares the Cases and Offences for which the Exigent shall be awarded, if the Party can not be found or brought in by Attachment or Distress; and not against any other. Also, the 18 *Edw. 3. §. 2. c. 5.* says—“No Exigent shall from henceforth go out, where a Man is indicted of Trespass; unless it be against the Peace, or of Things which be contained in the Declaration made in that Case at the last Parliament.” But upon full Consideration, I am very well satisfied that the Counsel for the Defendant judged right in laying no Stress upon this Objection. The Offences laid in these Informations, and the Proceedings upon them, are at the *Common-Law*. The *Statutes* giving Process of Outlawry in certain Cases, and restricting its issuing in others but under certain Circumstances, do not affect the present Question: The Process is warranted, in the present Case, by the *Common-Law*, or not at all. *Actual Force* or Violence does not appear to be the Criterion upon which the Process of Outlawry was founded. The *Greatness of the Crime*, and the Se-

verity of the Punishment seem to be the material Circumstances originally attended to, in founding this Process; according to the Passage I have just cited from *Coke*, as to the earliest Times: For, Felony does not imply or convey the Idea of actual Outrage; Grand Larceny being in its Definition, as well as Practice, different. And *Hawkins* Confirms this Notion, by saying "that this Process probably lay for all Crimes of a * higher Nature than

* 2 Hawkins
P. C. L. 2. c.
27. p. 302. "Trespass *vi et armis*." The Extension of this Process is supposed by Lord *Coke*, in the Passage I quoted, (and what he says, is repeated, without Examination, by a Variety of Authors,) to have been somewhat before *Bracton's* Time. The establishing that Period, for a supposed Ordinance concerning Outlawries, strongly authenticates the Testimony of that Cotemporary Writer, touching the Cases in which, and under what Circumstances this Process lay. Lord *Coke* saw, that it was impossible to say "that

† Lib. 3. p.
27. b. "Outlawry did not lie for any Crime under Felony:" Universal Practice shewed the Contrary. So he supposes a positive Statute made about *Bracton's* Time. There does not appear any particular Ordinance for extending this Process: And there is no Authority for the Supposition. But *Bracton* (who wrote in the Reign of Henry the 3d.) says† "that it lay in *omni transgressione quæ fit contra pacem*;" and afterwards, "*pro omni transgressione, licet minimâ, ubi quis ad pacem Domini Regis vocatus, venire recusaverit, et hoc propter Contumaciam*." That this necessary Ingredient "*Contra pacem*" did not mean positive Force in the Committing of the Offence, appears from the Reason given why it lay for Felony, 2 Ro. Abr. 805. "Outlawry lay for Felony;

† 18 Edw. 3.
ft. 1. "because it was *contra pacem*." For, that could not mean, (as I have already said) more than its being an Offence in its Nature against the Laws of Society, and a Disturbance of that good Order and Government which keeps a State in Unity and Peace. The Crime of *Larceny*, in its very Nature, is secret and fraudulent, unless it be done with open Violence; and then it is distinguished by the aggravated Name of Robbery. Besides, In the Case of Writs *quare vi et armis*, (in which Cases this Process is given,) it is acknowledged to be on account of the *supposed*, not the Actual Force. And so is the same Place in 2 Ro. Abr. 805: and the 35 H. 6. 6. *and^b and many other Books. In Fact, therefore, it appears from *Bracton*, "that every Offence committed

§ 18 Edw. 3.
ft. 2. c. 5. "against the Peace subjected the Delinquent to the Process of "Outlawry." And the Cases shew, that the Peace of the King is broke by Disorders without Force. And indeed some of the greatest Crimes are without Force. If Force was the Criterion on which this Process of Exigent was founded at Common-Law, why was that Process given by the ‡ first Statute of Edward the 3d. in the Case of *Riots &c*? Or what Occasion had there been

‡ 18 Edw. 3.
ft. 2. c. 5. for the § subsequent Statute of Edw. the 3d to say—"From henceforth, it shall not issue in Trespass, unless it is against the

"Peace,"

“*Peace*,” if the Practice had not been, upon Indictments, *though not so alledged*, for Process of Exigent to issue? And that seems to be true Reason of the last restrictive Statute. I don’t find it ever was denied, but that upon a Presentment or Indictment for the King, Process of Outlawry lay: And so it is expressly said to be agreed, in *Brooke* Title “Exigent;” which cites 8 H. 6.† But a Number of Outlawries have been found, in Crimes laid to be *contra pacem*, *without vi et armis*, and which could not be committed with Force; and this Error never assigned: Which, alone, is decisive. I think, Mr. Attorney-General produced One as far back as the 5th of *Edward* the 4th.

† Vide Bro. Abr. Title Exigent and Capias, pl. 29. and Title Process, pl. 16.

The SECOND Error assigned is as to the PROCLAMATIONS.

The Return says—“I have caused public Proclamation to be made, *in Manner and Form as I am within commanded*.” This is certainly *too loose*: The Proclamations are not sufficiently set out, for the Court to judge whether they were properly made or not. I thought this Error *fatal*. But Mr. *Thurlow* satisfied me “that it was *unnecessary* to make ANY Proclamation at all.” The Statutes which require Proclamations do not extend to this Case: And they are not required by the *Common-Law*. Indeed, this Error was in a Manner dropped and given up by Serjeant *Glynn*, upon his Reply: He did not contend “that they were necessary.” The present Record, drawn in the Crown-Office and settled by the King’s Counsel, shews under what Obscurity and Perplexity this Matter lies: The Result of Ignorance in the Practisers; and productive of a shameful Confusion in the Precedents of the Office. They have not distinguished between *Civil* and *Criminal* Outlawries: They have not distinguished between the manner of proceeding to Outlaw in *Criminal* Cases, *before* and *after* Conviction. All is jumbled together: Whatever is required in *any* Case, they have applied to *All*. Circumstances are unnecessarily required, and defectively returned; because former Mistakes are copied as Precedents, without Examination. But, as the Proclamations, in *this* Case, were nugatory and superfluous, the Imperfection of the Return is of no Consequence: It is no Error.

Of the SECOND SORT of Errors, *Critical* and *Verbal*, Two are assigned: Which were argued.

1st. For that it is not shewn, nor does it appear by the Return of the Sheriff of *Middlesex*, “that the Defendant was a first, second, third, fourth, and fifth Time exacted *at the County-Court of the County of Middlesex*,” as, by the Law of the Land, he ought to have been, before he was outlawed.

UNDER

UNDER this Error thus assigned, Two Objections were made :
As to the *first Exaction* ; and as to the *subsequent*.

First. As to the *first*—The Return is by Two Men, Sheriff of *Middlesex* : “ At my County-Court, held &c.” So that Two Men, making One Officer, that is, *Sheriff* of the County of *Middlesex*, say “ At my Court held in the County of *Middlesex*.” To raise a Doubt, it is necessary to go out of the Record, into History and Law. We know from thence, that the same Man might be Sheriff of *two* Counties. Till the 13th of *Elizabeth*, One Person was Sheriff of *Somerset* and *Dorsetshire* ; and so of *Suffex* and *Surry* ; of *Oxford* and *Berks* ; of *Nottingham* and *Leicestershire* : And to this Day, the same Person is Sheriff of *Cambridge* and *Huntingdonshire*. Such a Sheriff might by Law hold in either, the County-Court of the *Other*. 6 H. 7. 15.^b In the Case of the Sheriff of *Somerset*, who was then also Sheriff of *Dorsetshire*, “ my Court in the County of *Somerset*” was adjudged uncertain. 11 H. 7. 10.^a in a like Case, *Rede Fairfax* and *Hussey* inclined to think it certain enough ; and adjourned the Consideration. But here it is impossible to raise a Doubt. Unless the Sheriff of *Middlesex* may hold the Court of another County in *Middlesex*, “ At my County-Court” can only be the County-Court of *Middlesex*. Two Men, Sheriff of *Middlesex*, never were nor could be Sheriff of any other County. The Error is not assigned, for want of any technical Form of Words ; but “ that it is not shewn, nor does it appear by the Return :” Whereas I am Opinion it is shewn, and does appear by the Return, that the County-Court was of *Middlesex*, and could not possibly be the Court of any other County.

Secondly—As to the *subsequent Exactions*—The Objection is “ that it is not shewn, nor does it appear, where the Court was held, at which he was exacted.” The Return, having specified the Place where the Court was held at which he was first exacted, states severally the subsequent Exactions, “ at my Court held at the same Place.” So that the whole Doubt is “ Whether the same Place includes the Description of the Place referred to :” Which can not be a Doubt, in any Language of the World. For, in Truth, the Doubt can be no Other than “ Whether the same Place means the same Place, that is, the Place before described.”

SECOND Critical Error. The only other Error assigned and argued, is—

“ It is no where expressly shewn, that the Place called *Brook-street*, where the several County-Courts are supposed to have been held, is in the County of *Middlesex*.” The Return says—

says—"At the House known by the Sign of the Three Tuns in "*Brook-street* near *Holborn* in the County of *Middlesex*." The Counsel for the Defendant contend, that the true Construction ought to be, to apply "in the County of *Middlesex*," to *Holborn*, and not to *Brook-street*; and so make a *Stop*, at *Brook-street*. It is impossible for me to Doubt whether "*near Holborn*" is not Part of the Description of *Brook-street*. It could be added for no other Reason: It could answer no End, to say "*near Holborn*;" but as Part of the Name or Description of *this Brook-street*, in Contradistinction to some other *Brook-street*. It is immaterial, what County *Holborn* is in: But the Sheriff was bound to shew that *Brook-street* was in *Middlesex*. There is no *Law* in this: It is a Question of *Construction*. All Men can judge of it; and would treat with Contempt the Judgment of this Sovereign Court, if it could be founded upon so pitiful a Prevarication. It is not permitted to me to say "I doubt of the Construction," unless I do doubt; how much soever I may wish that this Outlawry should not stand. I am of Opinion, that, according to the Letter, Sense, and Grammatical Construction of the Sentence, the Court was held in "*Brook-street* near *Holborn*;" and that "*Brook-street* near *Holborn*" lies in the County *Middlesex*: And I am persuaded, there is no Man who can think otherwise.

THESE are the Errors which have been objected: And *This* the Manner and Form in which they are assigned. For the Reasons I have given, I can not allow any of them. It was our Duty, as well as our Inclination, sedulously to consider whether upon any other Ground, or in any other Light, we could find an Informality which we might allow with Satisfaction to our own Minds, and avow to the World.

But here, Let me pause!—

It is fit to take some Notice of the various Terrors hung out; the numerous Crowds which have attended and now attend in and about the Hall, out of all Reach of hearing what passes in Court; and the Tumults which, in other Places, have shamefully insulted all Order and Government. Audacious Addresses in print dictate to Us, from Those they call the PEOPLE, the Judgment to be given now, and afterwards upon the *Conviction*. Reasons of Policy are urged, from Danger to the Kingdom, by Commotions and general Confusion.

Give me Leave to take the Opportunity of this great and respectable Audience, to let the whole World know, All such Attempts are VAIN. Unless we have been able to find an Error which will bear us out, to reverse the Outlawry; it must be affirmed. The Constitution does not allow Reasons of State to in-

fluence *our* Judgments: God forbid it should! We must not regard *Political Consequences*; how formidable soever they might be: If Rebellion was the certain Consequence, we are bound to say “*Fiat Justitia, Ruat Cælum.*” The Constitution trusts the King with Reasons of State and Policy: *He* may stop Prosecutions; *He* may pardon Offences; it is *his*, to judge whether the Law or the Criminal should yield. *We* have *no Election*. None of *Us* encouraged or approved the *Commission* of either of the Crimes of which the Defendant is convicted: None of us had any Hand in his being *prosecuted*. As to *myself*, I took no Part, (in *another Place*,) in the Addresses for that Prosecution. *We* did not advise or assist the Defendant to fly from Justice: It was his *own Act*; And he must take the Consequences. None of us have been consulted or had any Thing to do with the present Prosecution. It is not in *our* Power, to stop it: It was not in *our* Power, to bring it on. *We* can not pardon. We are to say, what we take the Law to be: If we do not speak our *real* Opinions, we prevaricate with God and our own Consciences.

I pass over many *anonymous* Letters I have received. Those in *Print* are public: and some of them have been brought judicially before the Court. Whoever the Writers are, they take the *wrong* Way. I will do my Duty, *unawed*. WHAT am I to *fear*? That *mendax infamia* from the *Press*, which daily coins *false Facts* and *false Motives*? The Lies of *Calumny* carry no Terror to me. I trust, that my Temper of Mind, and the Colour and Conduct of my Life, have given me a Suit of Armour against *these* Arrows. If, during this King's Reign, I have ever supported his Government, and assisted his Measures; I have done it without any other Reward, than the *Consciousness* of doing what I thought *right*. If I have ever opposed, I have done it upon the Points themselves; without mixing in *Party* or *Faction*, and *without any collateral Views*. I honour the King; and respect the People: But, many Things acquired by the *Favour of either*, are, in *my Account*, Objects *not worth Ambition*. I wish POPULARITY: But, it is *that* Popularity which *follows*; not that which is *run after*. It is *that* Popularity which, sooner or later, never fails to do Justice to the Pursuit of *Noble Ends*, by *Noble Means*. I will not do that which my *Conscience* tells me is *wrong*, upon this Occasion; to gain the Huzzas of Thousands, or the daily Praise of all the Papers which come from the *Press*: I will not *avoid doing* what I *think is right*; though it should draw on me the whole Artillery of Libels; All that Falsehood and Malice can invent, or the Credulity of a deluded Populace can swallow. I can say, with a great Magistrate, upon an Occasion and under Circumstances not unlike, “*Ego hoc animo semper fui, ut Invidiam Virtute partam, Gloriam, non Invidiam, putarem.*”

The Threats go *further than Abuse*: PERSONAL Violence is denounced. I do not believe it: It is not the Genius of the worst Men of *this* Country, in the worst of Times. But I have set my Mind at Rest. The last End that can happen to any Man, never comes too soon, if he falls in Support of the *Law* and *Liberty* of his Country: (For, Liberty is synonymous to Law and Government.) Such a Shock, too, might be productive of Public Good: It might awake the better Part of the Kingdom out of that Lethargy which seems to have benumbed them; and bring the mad Part back to their Senses, as Men intoxicated are sometimes stunned into Sobriety.

Once for all, Let it be understood, "that no Endeavours of *this kind* will influence *any* Man who at present sits here." If they had *any* Effect, it would be *contrary* to their Intent: Leaning *against* their Impression, might give a Bias the *other* way. But I hope, and I know, that I have Fortitude enough to resist *even that* Weakness. No Libels, no Threats, nothing that has happened, nothing that can happen, will weigh a Feather against allowing the Defendant, upon this and every other Question, not only the whole Advantage he is intitled to from *substantial Law* and *Justice*; but *every* Benefit from the most critical Nicety of *Form*, which any other Defendant could claim under the like Objection. The only Effect I feel, is an Anxiety to be able to explain the Grounds upon which we proceed; so as to satisfy all Mankind "that a Flaw of Form given way to in *this* Case, " could *not* have been got over in *any Other*."

FROM the PRECEDENTS we have seen, it appears, that a Series of Judgments have required a *technical Form of Words*, in the Description of the COUNTY-COURT at which an Outlaw is exacted: That after the Words "*at my County-Court*," should be added the NAME of the County; and after the Word "*held*," should be added—"for the County of ———," (naming it.) Whereas here, the Sheriff says "*at my County Court*," without adding—"of *Middlesex*:" And he says—"held at the House &c," without adding the Words "*for the County of Middlesex*," after the Word "*held*."

As to the first Expression, The Cases begin as far back as the 7th of *James* the 1st. As to the second Expression, They begin about the the 18th of *Charles* the 2d.

If we are compelled by Authority, to look upon *either* Expression as *technically necessary*, it is sufficient upon *this* Occasion; because, here, *Both* are wanting.

If

* P. 7. Jac.
2 Ro. Abr.
802. Whit-
ing's Case.
† Mich. 16
Jac. Alder's
Case, 2 Roll's
Reports 52.
‡ Tr. 13 C. 2.
1 Keble 50.
51. Rex v.
Siclemore.
§ Rex v.
Hallet, H. 22.
23. C. 2. ro-
tulo 16. Rex
v. Frelton, H.
22. 23 C. 2.
rotulo 17. Rex
v. Vernatt.
H. 1. 2 J. 2.
rotulo 9.
|| M. 18 C. 2.
Rex v. Tuf-
ton. 2 Keble
128.
* H. 22, 23
C. 2. 1 Vent.
108. anony-
mous.
† E. 31 Car.
2. 2 Shower
60.
‡ H. 1 J. 2.
3 Mod. 89.
anonymous:
(S. C. as Rex
v. Vernatt,
left with us
from the Re-
cord.)
§ M. 3 W. &
M. 1 Show.
309. Rex v.
Lady Oneby
alias Truder.
* Tr. 9 W. 3.
1697. rotulo.
1. Rex v.
Bell.

If an Outlawry be returned in this manner—" *Ad Com. meum tent. apud Cicestriam in Comitatu Suffex &c.*" it is erroneous; because it is not said " *Ad Com. meum Suffex tentum &c.*"* *Alder* was outlawed for Murder; And it was moved for Error, that the Sheriff returned—" *Ad Com. meum tentum apud D. in the County of Northumberland,*" and did not say " *ad Com. meum Northumbriae, tentum &c.*" And this was holden to be Error.† Among the Errors for which, the Reporter says, the Outlawry was reversed, the second is—Not said " *Suffolciae,*" after " *Com. meum:*" And this, he says, had been a *Common Exception*‡ Three Copies have been left with us, from the Records: And they are " *ad Com. meum § Middlesex tent. &c.*" agreeable to the Judgments I have mentioned. *Winnington* assigned Error of Outlawry: And One, said to be allowed, was "that the Court is said to be held at the County of *Hereford*; and doth not say—" *for the County.*"|| An Outlawry was reversed, because said—" *Ad Com. meum &c.*" and not said " *pro Comitatu.*"* This Term, several Outlawries were reversed, for want of " *pro Com.*" or " *nec eorum aliquis,*" or " *per judicium Coronatorum.*"† One who was outlawed for the Murder of Sir *Edmondbury Godfrey*, now brought a Writ of Error in his Hand to the Bar; praying "that it might be read and allowed." The Outlawry was reversed. Among the Errors assigned, One was "that it did not appear the Court was held *pro Comitatu.*" The other was clearly a fatal Objection‡ After stating the Case, Sir *Bartholomew Shower* says—"She brings a Writ of Error, to reverse the Outlawry: And the Error which I assigned *ore tenus*, was the usual Fault, in not saying The County-Court was held " *pro Comitatu.*" The Outlawry was reversed. § This is a very strong Authority, to shew that in the third of *W. & M.* it was settled "that the Words *pro Comitatu* were technically necessary." A Record of an Outlawry has been found, agreeable to this Form established as necessary; and says—" *Ad Com. meum tent. pro Com. Middlesex, apud le Cheshire-Cheese in Gray's-Inn-Lane*" "in Com. prædict."*

No Case, Report, or Record has been found, since the third of Queen *Ann*, which can be of any Use, either way, upon this Point, or any of the Errors assigned.

The Authorities I have stated stand, to this Day, uncontradicted. They are many; and have prevailed above a Century. I think, they *begun* against Law and Reason. The former Authorities were otherwise: The Precedent in *Dalton* is otherwise. There is no Reason for requiring these Words: There is sufficient Certainty, without them. It is impossible to doubt, upon this Record, but that the County-Court at which the Defendant

was

was exacted, was the Court *of* and held *for* the County of *Middlesex*. But, this is a Criminal Case, highly Penal. Outlaws have had the Benefit of this Exception, for a great Length of Time. *Can* we refuse it to the Defendant? We *can not*: Though I am clearly of Opinion, "there was not a Colour, *originally*, to hold "these Words to be necessary." The Objection to the Blunder between the Peace "of the *now*," and "the * *late* King," after * *Vide Look-up's Case*. Conviction, has not much more Solidity in it: Yet the House of Lords thought themselves bound by Precedents. And so must we, had the Flaw been discovered before Judgment. I *can not* say, "that it does *not appear* upon this Record, that the Court "was *of* and held *for* the County of *Middlesex*:" because I am clearly of Opinion "that, most manifestly, it *does*." But I *can* say, that a series of Authorities, unimpeached and uncontradicted, from the 7th of *James* the First, as to One Expression, and from the 18th of *Charles* the Second, as to the Other, have said "such "Words are *formally necessary*:" I *can* say, that *such Authority*, though begun without Law Reason or Common Sense, *ought to avail* the Defendant. It would be dangerous, to say that any Exception *allowed so long*, should now be over-ruled. The Exception certainly would not have prevailed, had it been opposed at first: But, before the 3d of *Queen Ann*, there being no Opposition after a Writ of Error was granted, the Court considered the Crown as consenting to the Reversal upon *any* Pretence, how slight soever. Though that is *not* the Case *now*, The *Necessity of the Form of Words* must not be canvassed; since it has been *so often adjudged* necessary. The Officers of the Crown are in Fault, for not attending to the Form prescribed, and copying the Precedent of the *King v. Bell*.

There can no Mischief or Incertainty arise from this Determination: because, it being once known "*what* Form of Words "is necessary," it is easy to follow it. But great Suspicion and Incertainty must follow, from this Court's *allowing* a formal Exception One Day, and *disallowing* it another.

I beg to be understood, that I ground my Opinion *singly upon the Authority of the Cases adjudged*; which, as they are on the *favourable* Side, in a *Criminal Case highly Penal*, I think ought not to be departed from: And therefore I am bound to say that, *for want of these technical Words*, the Outlawry ought to be *reversed*.

THE Other THREE JUDGES spoke *seriatim*. But, as their Arguments tended to support and illustrate the same Doctrine which his Lordship had laid down; and as they did not differ, in any Part, from the Opinion given by his Lordship; I omit, for the sake of Brevity, reporting particularly what they said.

A RULE was accordingly made (in each Cause) “that, the Outlawry be REVERSED.”

On the same 8th of *June* 1768,

RULES were made, for the Prosecutor to shew Cause (upon *Tuesday* then next) why the Judgment should not be arrested; and why the Verdict should not be set aside.

And also a RULE for now remanding the Defendant to the Custody of the Marshal, and for bringing him into Court again upon *Tuesday* next.

Accordingly, on *Tuesday* the 14th of *June* 1768, the Two following Points were argued, very strenuously and very copiously on both Sides; namely, “Whether the Informations could be exhibited by the *Solicitor-General*,” and “Whether the Amendment could be made by a *single Judge out of Court*, in the Manner before specified.” The former was objected to, as a Ground for arresting the Judgment: The latter, as a Ground for a new Trial.

LORD MANSFIELD, as to the Motion in Arrest of Judgment, adhered to the Opinion he had before given, “that the Informations were *well* exhibited by the *Solicitor-General*.”

As to the Motion for a new Trial on account of the Amendment, he *declared* his Satisfaction at the Motion’s having been made, and the Matter so fully discussed and understood.

Matters of *Practice*, he observed, are not to be known from *Books*. What passes at a Judge’s Chambers is Matter of *Tradition*: It rests in *Memory*. In Cases of this kind, Judges must inquire of their Officers. This is done in Court, every Day, when the Practice is disputed or doubted. It is, in its Nature, Official. The Officers are better acquainted with it, than the Judges. For his own Part, neither his Education, nor his Walk in Life before he came into this Court, ever led him into any Knowledge of the Practice of Orders made by Judges in the Vacation. The making this Order for the Amendment appeared to him to be right, and to be a Matter of Course. It came to him as a Matter of Course, and recommended *as such* from a Gentleman of *great Experience*, who (he knew) would as soon have cut off his right Hand, as have deceived him by representing this *as* a Thing of Course, when it was not so. Accordingly, he issued a Summons, “to shew Cause why the Amendment should not be made.” A Summons always issues, before a Judge makes an Order. A Summons,

mons, therefore, went out, of Course. Upon the Attendance, his Lordship asked Mr. *Hughes*, (an old and experienced Officer,) the Defendant's Clerk in Court, "Whether there was any Doubt " but that this was amendable." He, very rightly, and as was his Duty, *admitted* " that it *was* amendable, and that he could " not say otherwise." His Lordship then took down a Book in which were entered some Cases where Informations were amended by a Judge's Order, just before Trial; and after reading one or two, Mr. *Phiips*, the Defendant's Attorney, desired him, not to give himself any further Trouble. Mr. *Philips* said indeed, " that he *could not Consent* to it." But he did not *object* to it, nor *contradict* it; nor was it objected to, *at the Trial*. The Counsel *saw* that there could be no Objection made to the Order.

Mr. Justice BLACKSTONE, in his Third Volume,* gives the * Book 3. c. Rise and History of Amendments, very shortly and in few Words. 25. P. 407. He shews how it stood, before the Reign of *Edward* the First; in whose Time, (probably about his 13th Year,) *Britton's* Treatise was published, in the King's Name and by the King's Authority: Which seems intended to give a Check to the unwarrantable Practices of some Judges who had made false Entries on the Rolls, to cover their own Misbehaviour. And about the 18th Year of his Reign, almost all the Judges, even the most able and upright, were prosecuted by him; and some of them very heavily fined; And One of the Causes assigned for it, was erasing and altering Records: Particularly, Sir *Ralph Hengham* was fined 800 Marks at least, (some say 7000.) for altering, out of mere Compassion, a Fine set upon a very poor Man, from 13s. 4d. to 6s. 8d. Upon this, the Judges grew so strict, that after Inrollment they would not amend their Judgments, even to set them right. They were so alarmed by this Severity, that through a Fear of being said to do wrong, they hesitated at doing that which was right; and because criminal and clandestine Alterations, to make a Record speak a Falstiy, were forbidden, they conceived that they might not judicially and publicly amend it, to make it agreeable to Truth. But Declarations and Pleas might always be amended at any Time: It was only *Inrollments* that were prohibited by *Fritton*. There never was any Distinction, (as to Amendments at the Common Law,) between Criminal and Civil Causes; that is before the † 8 H. 6. of Jeofails. † 8 H. 6. c. The Judges adhered to such strictness, that Justice was entangled^{12.} in the Net of Form. The Legislature was therefore forced to interpose: And no less than Twelve Statutes of Amendment were made, to remedy these opprobrious Niceties.

The

The fundamental Question here is, "Whether an Information may be amended, at *Common Law*, at the Desire of the Crown, *after Plea pleaded*."

Numberless Precedents are produced, from the Time of Queen *Elizabeth*, and all through the Reigns of *James* the First and *Charles* the First; and many Side-Bar Rules, which shew that it was of Course: For, if it were not of Course, it would have been moved in Court, as every Thing not of Course is.

So long ago as 6 *W.* 3. Lord Chief Justice *Holt* treats it as a known Thing, a Thing of Course. 1 *Salk.* 47. *The King* against *Harris*. A Motion was made, to amend an Information for Perjury; and opposed, because the Defendant had pleaded. *Et per Holt* Chief Justice "As to Amendment *after Plea pleaded*, there is no great Matter in *that*. After a Record has been *sealed up*, I have known it amended, even just as it was going to be tried."

• 1 *Salk.* 50.
anon.

In 12 *W.* 3.* Sir *Bartholomew Shower* moved to amend an Information of Forgery, in Ten Places: And, though opposed, the Motion was granted, because it made no Alteration of the Fact; and that, without Costs or Imparlance. In the Case of *The King* against *Charleworth*, 2 *Stra.* 871. the Information was for forging a Warrant of Attorney to acknowledge Satisfaction upon a Judgment of *Easter* Term: And, after Issue joined, the Record appearing to be of *Hilary* Term, the Information was amended, without Costs (the Prosecutor having been admitted a Pauper,) and without giving the Defendant Leave to plead *de novo*. And *Hil.* 10 *Ann.* *The Queen* against *Simmonds* was there cited; where the Title of an Act set forth in an Information was amended. And there is *no* Authority to the Contrary. There can be no Doubt therefore of its being amendable; upon the Authority of a Series of Precedents, without any Objection, and all these printed Cases uncontradicted.

And *why* should it not be amended? If it had not been amended, the Attorney-General would have dropped this Information, if he thought there was a Slip in it; and have brought another. And this would have been more inconvenient to the Defendant, and have harassed him more: He would have no Benefit, and more Vexation. This Amendment avoids Delays, and saves Expences: It saves the Defendant the Expence of bringing his Witnesses up again. The Attorney-General pays no Costs. The Defendant *never asked* Leave to *plead again*, or to have the *Trial put off*: Nor was there any Cause for it. The Defence was not at all varied. The *Substance* of the Charge was not at all altered: It remained the *very same*. The true Merits of the Cause stood the *very same*. There is no Difference at all, but that the Prosecutor

secutor must *prove more*. The Nature of the Paper was the same: Every Objection was equally open to the Defendant, and he had the further Advantage of any verbal slip in setting out the Libel upon the Record.

But it is objected, "that it could not be done *out of Court*."

Answer. It might be done by the Court: It might be done at the Side-Bar. And a great Deal that may be done in Court, is done by Judges at Chambers, in Term-Time: In Vacation, a great Deal more is done by them at Chambers; because it can be done no where else. Most of the Precedents of Amendments before Trial are in the Vacation. Lord Chief Justice *Lee* amended a Record of an Information, sent up from *York*; the Mistake being there discovered during the Assizes: And the Record so amended was returned, and immediately tried. I am obliged to a Gentleman at the Bar, who sent me a Case of *The King* against *King*, 19th of *March* 1746, where Mr. Justice *Foster* ordered the Word "*Division*" to be struck out, and "*Parish*" to be inserted; though it was strenuously opposed, and the Defendant must have been acquitted, if it had stood unamended. Mr. Justice *Foster* had applied himself particularly to the Crown-Law; was a strict Adherer to legal Forms; and had more Experience in Business proper to be done out of Court, than any other Judge.

"Whether it was a *necessary* Amendment, or not," I give no Opinion, nor form any.

There is a great Difference between amending *Indictments*, and amending *Informations*. Indictments are found upon the Oaths of a Jury; and ought only to be amended by themselves: But Informations are as Declarations in the King's Suit. An Officer of the Crown has the Right of framing them originally; and may, with Leave, amend, in like Manner as any Plaintiff may do. If the Amendment can give Occasion to a *new Defence*, the Defendant has Leave to change his Plea: If it can make *no* Alteration as to the Defence, he don't want it. In *this* Case, the Defendant could not possibly plead *any other* Plea.

I am fully satisfied, that none of the Defendant's Counsel or Agents ever thought there was the least Colour of Objection to the Order for Amendment: But, long after the Trial, it occurred to Others, that by calling it "*an Alteration of the Record*," instead of "*an Order to amend the Information*," they who derive all their Knowledge and Law from Libels in the News-Papers, might be bewildered and misled.

Mr. Justice YATES took Notice of a Difference which there seemed to him to be, between the Attorney-General, and the Master of the Crown-Office: The Attorney-General is the Officer of the *King*; the Master of the Crown-Office, the Officer of the *Public*. Informations exhibited by the King's Attorney-General are considered as the King's *own* Prosecutions, and are called "Declarations for the King:" Therefore *no Costs* are paid upon *them*. In the *other* Informations, Costs are often payable.

He said, he was greatly confirmed in his Opinion, upon the Case now before the Court, and had the greater Reason to think it a right One; as his Brother Glynn had not, by all his Arguments, been able to shake it.

He agreed, that the *Statute*-Power of amending does not extend to Criminal Proceedings: But in *Common-Law* Amendments, there is no Difference between Criminal and Civil Proceedings. And he cited, and repeated (in Part) the Case of *The Queen* against *Tutchin*, in 6 *Mod.* 268 to 287.* He cited also, to the same Purport, the Case of *Bondfield qui tam &c.*, v. *Milner*, in this Court, *M. 1 G. 3.* [*Vide ante*, p. 1098, 1099.]

* Vide 6
Mod. 274,
282, 283.

The Question therefore turns upon *what is a Common-Law Amendment.*

Many Cases have been cited, of *Common-Law* Amendments. But there is *One*, which has not been mentioned: It is *The King* against *Goffe*, in 1 *Lev.* 189. It was moved to amend an *Information of Perjury*. And it was ruled, that they should give Notice of the Things to be amended, to the Defendant; and he to shew Cause why it should not be amended: For, the Court said, "it *might be amended.*" The Case of *The King* against *Charleworth* was a very strong One: For, the Defendant must have been acquitted; And yet that Amendment was made without Payment of Costs, and without Liberty to plead *de novo*.

Indictments, being upon *Oath*, can not be amended. But *Informations* may be amended; because they are *Declarations* for the King. 2 *Viner* 394. Title "Amendment and Jeofails," pl. 12. 12 *Mod.* 229. *The King* against *Lewis*. 6 *Mod.* 281. 1 *Stra.* 185. *Rex v. Nixon*.

It is clear, therefore, that Informations *may be amended*, at *Common-Law*.

As to their being amended by a *Judge at Chambers*—It is, most certainly, the PRACTICE. *Non constat*, "when it begun:" But it

it seems to have been exercised Time out of Mind; and that the Business of the Court could not be done without it. The Business done at Chambers is the most irksome Part of the Office of a Judge: But it is greatly for the Benefit of the Subject, and tends to the Advancement and Expedition of Justice. It arises from the Overflowing of the Business of the Court; which can not be all transacted *in* Court. The Order of a Judge is subject to an Appeal to the Court: but if acquiesced under, it is as valid as any Act of the Court. It is common, to apply to the Court, "to discharge a Judge's Order:" But the very Course of applying to the Court, "to discharge the Order of a Judge, made at "Chambers," supports the Proceeding; and shews that the Order is valid as to its Effect, if it be not discharged. Indeed, if it becomes necessary to enforce it by Attachment, there must be a Motion "to make it a Rule of Court." The Validity of a Judge's Order can be impeached only two ways: either by appealing to the Court, to set it aside; or, if made in Vacation, by applying in the next Term, to set aside the Proceedings that have been had under it. Now, this Order was made in Vacation. The Defendant might have declined going to Trial, and might have moved, in the next Term, "to set aside the Verdict." But he acquiesced, and went to Trial.

The *Materiality* of this Amendment is not in any degree equal to *many* of those that were made in the Cases that have been cited. The *Defence* was, indeed, *made easier* thereby: For, the Word "*Tenor*" imports a *literal* Copy. It could not vary the *Nature* of the Defence: The Proof lay upon the *Crown*. If the Defendant had had an Objection to the Alteration, he should have made *no Defence at the Trial*: That would have been a consistent Conduct. But as he *did make a Defence*, he has *acquiesced* in it. And yet, if he had made no Defence at the Trial, the Verdict nevertheless would have stood: For, it could not have been set aside, *unless* the Order was a *bad* One; which it now clearly appears, "that it was *not*." Therefore it ought to be supported by the Court.

This is a Motion for a new Trial, *after* a series of Proceedings upon it. The Court have indeed spontaneously relaxed their own Rule, in order to give an Opportunity of having this Matter fully and fairly argued and considered: Which I am glad of; but I hope, it will not be made a Precedent.

Mr. Justice ASTON—I entirely concur with my Lord and my Brother YATES, in discharging these Rules. I think, the Importance of this Case does not consist in the Nature of it; but in the Noise and Clamour that it has occasioned, and the Misrepresentations that have been thrown out to the Public, of the Conduct

Conduct of the Judges in the Course of the Proceedings in it; who have been very unjustly charged with being induced to it by partial Motives.

In the Case of *The Queen and Norton*, reported in Lord Fortescue's Reports 232, the Court agreed that it is a General Rule, "to amend Informations at any Time, even just before Trial:" But then it must not make the Information different. And, to be sure, it ought not: For, it would make a different Defence. In the Case of *Rush and Seymour*, 10 Mod. 88. it is said, "that Statutes of Amendment extend only to Pleadings of Record; and that Pleadings, while in Paper, are amendable by Common-Law; and that it is a Motion that the Court can not refuse: But they may refuse it, if the Party desiring it refuse to pay Costs, or the Amendment desired should amount to a new Plea." And as to the *Practice*, it was almost of Course, where the Amendment made no Alteration in the Defence. Where it altered the Defence, then it was upon Terms. There is nothing that I ever looked upon as so plain.

Then as to doing it *at Chambers*—The Practice of the Court has been always so. The Business done at Chambers is become an immense Load upon the Judges, and is exceedingly troublesome to them: But it is the *Practice*, the *Custom* of the Court; and therefore, the *Law of the Land*. And what has been done by the Judge at Chambers, in the present Case, has been *rightly* done: If it had not, I should have had no Scruple in overturning it. But here is not the least Colour for *that*: The Order is justified by a vast Number of Precedents. I am glad, that it has been thus fully discussed; to convince the great Number of Persons that I see attending here, that Judges have acted in this Case, as they do in all Others; and that there is no Sort of Ground for the scandalous Intimations that have been industriously propagated, of their having been influenced by partial or improper Motives.

Mr. Justice WILLES concurred in both Points.

He declared himself to be clearly of Opinion that *during the Vacancy* of the Office of the King's Attorney-General, (which was the present Case,) the Power of the Attorney-General *devolves* upon the Solicitor-General for the Time being. Consequently, this Information was regularly and properly exhibited.

As to the *Order for the Amendment* of the Information—He held it to be justified by an uninterrupted series of Precedents, from the Time of *W. 3.* at least. And as the Order was right, he saw no Ground for the Obloquy that had been thrown upon the

the Noble Person who made it. It makes no Alteration in the Charge: It makes no Alteration in the Defence. No Objection was made to it: No Advantage was taken of it. It was acquiesced in: And the Cause went on to Trial. It is authorized by several Cases, and by a great Number of Precedents for many Years backward. He grounded his Opinion, he said, upon the Chain and Series of Precedents for near a Century past.

He concurred therefore with his Lordship and his Brothers, that Both Rules be discharged.

THE COURT unanimously ordered Both these Rules to be DISCHARGED.

Serjeant Glynn thereupon moved, that the present Proceedings might be *entered upon Record*; that the Defendant might have Opportunity of applying to another Jurisdiction.

THE COURT told him, They could not go out of the usual and ordinary Method and Course of Proceeding: Every Thing must be done *in this Case, in the same Manner* as in all other Proceedings of the *like kind*.

Mr. Attorney-General then moved for LORD MANSFIELD'S *Report* of the Evidence; (the Causes having been tried before his Lordship, at *nisi prius*.)

Whereupon, After the Records of the Convictions had been read,

LORD MANSFIELD reported the Evidence in each Cause.

The Attorney-General and the Serjeant made their respective Observations upon the Evidence reported.

Mr. *Wilkes* then applied for the Sentence of the Court.

THE COURT told him, it was necessary to take some Time to consider of it: The constant Course is so. They promised to do it without Delay; and to give Mr. *Wilkes* Notice, when they were ready: But, at present, they had not had the least Conference together about the Punishment; nor could they, without great Impropriety, have had any, before they had heard *all* the Arguments.

Serjeant Glynn then hinted at his Client's being bailed in the mean Time.

But THE COURT told him, he *knew that could not be done*.

The Defendant was REMANDED to the Custody of the Marshal.

On *Friday* the 17th of *June* 1768,

THE COURT declared their Intention of giving final Judgment to Morrow; and ordered that the Defendant should be brought up accordingly.

On *Saturday* the 18th of *June* 1768,

Mr. Justice YATES (as second Judge) pronounced the Sentence of the Court in each Cause; *viz.*

On the Information for the *North Briton*, No. 45. a Fine of 500*l.* and Imprisonment for Ten Calendar Months, and till the Fine be paid: On the other Information, 500*l.* Fine; And Imprisonment for Twelve Calendar Months after the Expiration of the former Ten; and to find Security for his good Behaviour for Seven Years, himself in 1000*l.* and Two Sureties in 500*l.* each; and to be remanded, till the Fine should be paid and such Security given.

Mr. *Wilkes* desired, that his former Imprisonment might be considered in the Punishment now inflicted upon him.

THE COURT assured him "that it had been so; and
" that they had *fully* considered *all* Circumstances, both for him
" and against him."

Serjeant *Glynn* then desired, that Mr. *Wilkes* might have the Benefit of a Writ of Error to the House of Lords.

LORD MANSFIELD answered, That this Court could not give any particular Directions about that Matter: He must apply to the *Attorney-General*. And he added, That if Mr. *Attorney-General* would take *his* Advice, he should grant it the Moment it was applied for.

Mr. *Attorney-General* said, he certainly should grant it *immediately*.

Mr. *Wilkes* then desired, that it might be put into such a Method, as that he might have the Advantage of objecting, in the House of Lords, to the Alterations made in the Record by LORD MANSFIELD at his Lordship's *own House*.

LORD

LORD MANSFIELD told him, that the Court could not alter the Law.

Mr. *Wilkes* replied, that he did not wish the Law to be altered.

LORD MANSFIELD—It is impossible to alter it in any *particular Case*: The same Course must be taken in *this Case* as is usual in others of the like kind. The Defendant's *Counsel* would advise him, his Lordship said, what were the proper Steps for him to take, in Order to have the Opinion of the House of Lords.

The Defendant was REMANDED.

THE RULES were drawn up in these Words—

* *Saturday* next after Fifteen Days from the Day of the Holy *Trinity*, in the Eighth Year of King *George* the Third. * (18th June 1768.)

The Defendant being brought here into Court in Custody of the Marshal of the Marshalsea of this Court, by Virtue of a Rule of this Court, and being convicted of certain Trespasses Contempts and grand Misdemeanours, in printing and publishing a seditious and scandalous Libel, intituled “*The North Briton*, “No. 45.” whereof he is impeached, It is Ordered that he the said Defendant, for his Offences aforesaid, do pay a Fine to our Sovereign Lord the King, of Five Hundred Pounds of lawful Money of *Great Britain*: And it is further Ordered, that he the said Defendant be imprisoned in the Custody of the said Marshal for the Space of Ten Calendar Months now next ensuing. And it is lastly Ordered, that the said Defendant be now remanded to the Custody of the said Marshal, to be by him kept in safe Custody, in Execution of the Judgment aforesaid, and until he shall have paid the said Fine.

Middlesex,
The King
against John
Wilkes Esq.

On the Motion of Mr. Attorney-General.

By the Court.

The Defendant being brought here into Court, in Custody of the Marshal of the Marshalsea of this Court, by Virtue of a Rule of this Court; and being convicted of certain Trespasses Contempts and grand Misdemeanours, in printing and publishing an obscene and impious Libel, intituled “*An Essay on Woman*,” and other impious Libels in the Information in that behalf specified, whereof he is impeached; and having also been convicted of certain other Trespasses Contempts and Misdemeanours,

The same
against The
same.

for printing and publishing a certain other Libel, intituled “ *The North Briton*, No. 45.” for which he hath this Day been sentenced, and ordered by this Court to pay a Fine of Five Hundred Pounds and to be imprisoned in the Custody of the said Marshal for the Space of Ten Calendar Months; It is now Ordered by this Court, That the said Defendant, for his Trespasses Contempts and Misdemeanours first abovementioned, in printing and publishing the said obscene and impious Libels, do pay a further Fine to our Sovereign Lord the King, of Five Hundred Pounds of lawful Money of *Great Britain*; and that the said Defendant be further imprisoned in the Custody of the said Marshal, for the Space of Twelve Calendar Months to be computed from and after the Determination of his aforesaid Imprisonment for printing and publishing the said other Libel intituled “ *The North Briton*, No. 45.” And it is further Ordered that he the said Defendant shall give Security for his good Behaviour for the Space of Seven Years, to be computed from and after the End and Expiration of the said Twelve Calendar Months to be computed as aforesaid; to wit, himself, the said Defendant, in the Sum of One Thousand Pounds, with two sufficient Sureties, in Five Hundred Pounds Each. And it is lastly Ordered, that he the said Defendant be now remanded to the Custody of the said Marshal, to be by him kept in safe Custody, in Execution of this Judgment, and until he shall have paid the said Fine and given such Security as aforesaid.

On the Motion of Mr. Attorney-General.

By the Court.

Afterwards, a Writ of Error was brought, returnable in Parliament, upon each Judgment: And Both Judgments were affirmed, as follows—

Die Lunæ 15^o January 1769.

Counsel having been fully heard to argue the Errors assigned in these Causes, the following Questions were put to the Judges—

“ Whether an Information filed by the King’s *Solicitor-General*, during the Vacancy of the Office of the King’s Attorney-General, is good in Law.”

“ Whether, in such a Case, it is necessary in point of Law, to aver upon the Record, that the Attorney-General’s Office was vacant.”

Upon the second Record—

“ Whether

“ Whether a Judgment of Imprisonment against a Defendant,
“ to commence from and after the Determination of an Imprisonment
“ to which he was before sentenced for another Offence, is good
“ in Law.”

Whereupon, the Lord Chief Justice of the Court of Common Pleas, having conferred with the Rest of the Judges present, delivered their unanimous Opinion upon the said Questions, with their Reasons.

To the First Question—That an Information filed &c, is good in Law.

To the Second—That in such a Case, it is *not necessary*.

To the Third—That a Judgment of Imprisonment &c, is good in Law.

Then ORDERED and ADJUDGED That the Judgments of the Court of King's Bench be AFFIRMED.

On *Wednesday* the 7th of *February* 1770,

Mr. *Davenport* moved that the Defendant might be brought up, either into Court within this Term; or before a Judge at Chambers after the End of it; to enter into the Recognizance required of him by the abovementioned Rule of Court: * For, * Vide ante, his Imprisonment will end upon a Day which does not fall within P. 2576. any Term; namely, upon *Easter Tuesday* next.

THE COURT told him, They had thought of this already: And they conceived the best Method would be, to make a Rule for his entring into the Recognizance before the Marshal, or some other Justice of the Peace for the County of *Surry*.

And accordingly, they ordered such a Rule to be drawn up: Which was done, in these Words—

ORDERED, that at the Expiration of the Imprisonment of the Defendant, by Virtue of the Judgment of this Court pronounced against him in this Cause on *Saturday* next after Fifteen Days from the Day of the Holy *Trinity* in the 8th Year of the Reign of his present Majesty, the Security required by the said Judgment to be given by him the said Defendant for his good Behaviour for the Space of Seven Years, to wit, himself the said Defendant in the Sum of 1000*l.* with two sufficient Sureties in 500*l.* Each, may be taken by and before any Justice of the Peace of and for the County of *Surry*.

2578

Hilary Term 10 Geo. 3. B. R.

Perrin and Another, *versus* Blake, Widow.

Thursday,
8th February,
1770.

THIS was a Demurrer to a Replication, in an Action of Trespass: And the Question was "Whether *John Williams* took an Estate for *Life*, or an Estate *Tail*, under his Father's Will."

The Testator, *William Williams*, at the Time when he made his Will, had only this One Son *John*, and Two Daughters: But he thought his Wife to be then with Child. However, there never was any other Child: And one of the Daughters was since dead, without Issue. One Clause of the Father's Will says—"Provided that should my Wife be enient with Child, and it be a Female, I give her 2000*l.* And if a Male, I give my Estate, real and personal, equally to be divided between said Infant and my Son *John*, when said Infant shall attain his Age of Twenty-One Years." In another Clause of it, the Testator declares it to be his Intent "that none of his Children shall sell his Estate *for longer than his Life*:" And *to that Intent*, he gives all his Estate to his said Son *John* and said Infant *for their Lives*; Remainder to Trustees, to preserve contingent Remainders &c; Remainder to the *Heirs of the Bodies* of his said Sons; Remainder to his Daughters, for their Lives; Remainder to Trustees &c; Remainder to the Heirs of the Bodies of his Daughters; And that the Share and Part of his said Daughters, if either of them should die, should immediately vest in the Heirs of their Bodies. The Defendant claimed under the Remainder to the Daughters; *John being dead*. The Plaintiff stated in his Replication, "that *John* before his Death, entered, and *suffered a Recovery*, to the Use of himself in Fee; and afterwards demised to the Plaintiff, for a Term of Years:" Under which Demise, the Plaintiff derives his Title. The Defendant insists that this is a bad Title; because *John* took only an Estate for Life, and therefore could not suffer a Recovery.

No Doubt was made of the Rule in *Shelley's Case* in *Coke Lit-tleton* and other Books,* "that when the Ancestor, by any Gift Devise or Conveyance, takes an Estate for Life, with Remainder mediately or immediately to his *Heirs*, in Fee, or in Tail; the Word *Heirs* is a Word of LIMITATION; and the Estate of Inheritance shall vest in the Ancestor; and the express Limitation for Life is of no Effect."

* 1 Co. 104.
Co. Lit. 22
& 319.^b

The REASON of the Rule (as it is generally agreed) was to preserve to the Feudal Lords the Fruits of the Seignory upon the Deaths

Deaths of their Tenants. If an Estate could have been limited to the Ancestor for Life, Remainder to his Heirs, the Ancestor might have acted during his Life as absolute Owner, and conveyed the Estate so as to destroy the contingent Remainder: And if he chose that it should go to his Heir, the Heir would have taken it as a *Purchaser*, and consequently not liable to Wardship Marriage or Relief. But the Policy of the Law said—"This shall not be."

Though the Reason of the Rule has now ceased, and a contingent Limitation to the Heir of a Tenant for Life may now be preserved against his Act, and Feudal Tenures are now in Effect abolished; yet, the Rule having been established, it was conceded, that it must be adhered to: And where there is nothing more in the Case, than a Devise to *A.* for Life, and afterwards to the Heirs of his Body, it was admitted on all Hands "that *A.* took an Estate Tail."

The Counsel for the Plaintiff did not dispute but that upon this Will there were Words which shewed the Testator's Intent to devise his Estate in strict Settlement. The Testator expressly declared "that he meant that none of his Children should sell for *longer than his Life*;" And to that Intent, devised to Trustees, to preserve *contingent Remainders*: Which seems equivalent to his saying "They should *not* have an Estate Tail;" "and that the Heir should take a contingent Remainder by such Description, as a *Purchaser*, which his Ancestor had no Power to alien." If the Heir was to take the Inheritance by *Succession*, there could be no contingent Remainder to preserve; and his Ancestor might alien. Therefore the Counsel for the Plaintiff did not dispute the Intent: But they contended, that be the *Intent ever so plain* from other Parts of the Will, the *Rule holds* "that the Inheritance *must* vest in the Ancestor."

The Counsel for the Defendant contended, that *if* the Testator's *Intent was manifest* from other Parts of the Will, "*Heirs*" might be construed a Word of *Description*; and the Heir should take the Inheritance as a *Purchaser*. That such a Devise was contrary to no Rule of Law. That a Testator might limit in this Manner, by apt Words; And *if* the Testator's Intent be *clear*, and what he intends be *agreeable to the Rules of Law*, it shall be *executed*; in what Manner soever he may have expressed himself.

The Cases cited were many, and difficult to reconcile. Each Side had a String of them.

THIS CASE was first argued on *Tuesday* the 7th of *February* 1769, by Mr. *Walker* for the Defendant, and Mr. Serjeant *Glynn* for the Plaintiff; and again, on *Tuesday* the 2d of *May* 1769, by Mr. Serjeant *Furland* for the Defendant, and Mr. *Dunning* (then Solicitor-General,) for the Plaintiff: After which, it stood for the Opinion of the Court, till this Day. And now Judgment was given for the Defendant, upon the Opinions of LORD MANSFIELD, Mr. Justice ASTON, and Mr. Justice WILLES, against that of Mr. Justice YATES.

THE COURT not being able, after the most mature Deliberation, to concur in Opinion, The Judges delivered their Sentiments *seriatim*: And Mr. Justice YATES holding it to be an Estate Tail; and LORD MANSFIELD and the other two Judges holding it to be an Estate only for *Life*; there was

JUDGMENT for the DEFENDANT.

The Plaintiffs brought a Writ of Error in the Exchequer-Chamber: And it was several Times argued there. The last Argument was the 8th of *May* 1771.

On the 29th of *January* 1771, THE JUDGES who composed that Court gave their Opinions *seriatim*. Sir THOMAS PARKER (then Lord Chief Baron,) Mr. Baron ADAMS, Mr. Justice GOULD, Mr. Baron PERROTT, Mr. Justice BLACKSTONE, and Mr. Justice NARES, were of Opinion for the Plaintiffs. Mr. Justice BLACKSTONE, (who made very able and elaborate Argument,) agreed with the Majority of the Court of King's Bench, "that *if* the Intent of the Testator manifestly and certainly appeared, (by plain Expression, or necessary Implication from other Parts of the Will,) that the Heirs of the Body of *A.* should take by Purchase, and not by Descent, then a Devise to *A.* for Life, and after his Decease to the Heirs of his Body, not only *might* but *must* be construed an Estate in strict Settlement:" But he thought, it *did not* manifestly and certainly appear, from the mere intended Restraint of the Power of Alienation in *A.* that the Testator *had* meant that the Heirs of *A.*'s Body should take by Purchase, and not by Descent; or even that he *knew* the Difference between the Two Methods of taking. The Lord Chief Justice of the Common Pleas (Sir *William De Grey*,) and the present Lord Chief Baron, were for affirming the Judgment of the Court of King's Bench. The Lord Chief Justice of the Common Pleas, spoke last; and, to the great Satisfaction and Edification of those who heard him, explained the Principles, went through all the Cases, and took Notice of every Thing which had been said at the Bar, or by any of the Judges from whom he differed: And

whoever shall have the Opportunity of seeing his Argument, will see the Subject exhausted in a most masterly Manner. I speak from what was the general Voice and Sense of *Westminster-hall*: But I did not hear, and therefore cannot report it.

THE DEFENDANT brought a Writ of Error, in Parliament: Which is *still depending*.

For *that* Reason, and because I did not hear the Opinions given in the Exchequer-Chamber, I do not now report those given in the Court of King's Bench. As the Case at present stands, it will not settle the general Question "Whether a Testator's *manifest Intent* may control the legal Operation of the Word *HEIRS*, as a *Limitation*." If the Writ of Error should proceed to a Hearing, it may be settled; and the whole Argument may then be fully stated: But I might have been thought too tedious, if, in its present State, I had gone into a long and voluminous Disquisition of the cited Cases. It is sufficient, at present, to say, that one Side relied upon the abovementioned Rule, and adjudged Cases which have made the Testator's Intention give Way to it; And the other Side relied upon plain Principles in the Construction of Wills, and adjudged Cases which, from the manifest Intent of a Testator, have, after an Estate for Life to the Ancestor, turned a Limitation to his Heirs into the Description of a Purchaser.

The Judges of the King's Bench were above Five Hours in delivering their Opinions. A particular Report of them must have run into a vast Length; and have been still imperfect, without adding those delivered in the Exchequer-Chamber, which I did not hear, and was incapable of reporting. If the Arguments of Lord Chief Justice DE GREY and Mr. Justice BLACKSTONE shall ever be made public; and *if* Judgment shall hereafter be given by the House of Lords; it may then be Time enough to attempt a complete Report of the whole Case: At present, I have thought it better to defer it.

* I do not reckon the Case of the King and Lookup a Reversal of any Opinion of the Court; because the Flaw of being laid against the Peace of the late King was not discovered till after Judgment given and entered.

It is remarkable that, excepting this Case and another in this Volume,* there never has been, from the 6th of *November* 1756, to the Time of the present Publication, a final Difference of Opinion in the Court in any Case or upon any Point whatsoever. It is remarkable too, that excepting these two Cases, no Judgment given during the same Period has been reversed, either in the Exchequer-Chamber or in Parliament: And even these Reversals were with great Diversity of Opinion among the Judges.

I will

I will endeavour, if Life and Health shall permit, to continue these Publications up to the present Time: There are many interesting Cases still remaining unpublished. But, for Fear of tiring the Profession, I propose to shorten the argumentative Part, as much as possible.

I am very sensible that I have not done Justice to the Matter, or perhaps the Language, either of the Court or the Bar: But I flatter myself that I have with tolerable Accuracy stated the *Cases* and also the *Points* upon which the Judgment turned.

The favourable Reception of the Work, and the increasing Demand, I do not impute to any Merit of mine, but to the great Estimation in which the COURT stands.

We who have seen some of the best of *former* Times, can not help observing the Preference due to *these*; and are equally surprized at the Multiplicity of Business now brought before the Court, and the Ability and Celerity with which it is dispatched, with universal Satisfaction.

I am informed, that at the Sittings for *London* and *Middlesex* only, there are not so few as Eight Hundred Causes set down a Year; and all disposed of: And though many of them, especially in *London*, are of considerable Value, there are not more, upon an Average, than between Twenty and Thirty ever heard of afterwards, in the Shape of special Verdicts, special Cases, Motions for new Trials, or in Arrest of Judgment: Of a Bill of Exceptions, there has been *no* Instance. (I don't include Judgments upon Criminal Prosecutions: They are necessary Consequences of the Convictions.) My Reports give but a very faint Idea of the Extent of the whole Business which comes before the Court. I only report what I think may be of Use, as a Determination or Illustration of some Matter of *Law*. I take no Notice of the numerous Questions of *Fact* which are heard upon Affidavits; (the most tedious and irksome Part of the whole Business.) I take no Notice of a Variety of Contestations, which, after having been fully discussed, are decided without Difficulty or Doubt. I take no Notice of many Cases which turn upon a Construction so peculiar and particular as not to be likely to form a Precedent for any other Case. And yet, notwithstanding this Immensity of Business, it is notorious, that in Consequence of Method and a few Rules which have been laid down to prevent Delay, (even where the Parties themselves would willingly Consent to it,) nothing now hangs in Court. Upon the last Day of the very last Term, if we exclude such Motions of the Term as by the Desire of the Parties went over of Course, as Peremptories, there
was

was not a single Matter of any Kind that remained undetermined, excepting One Case relating to the Proprietary Lordship of *Maryland*, which was professedly postponed on account of the present Situation of *America*.

One might speak to the same Effect, concerning the last Day of *any* former Term, for some Years backward.

I hope, that, in future, some other Person, of more Ability than myself, (I will not Compliment him with greater Fidelity,) will supply my Place. It would be great Pity to leave the Decisions of a Court so filled, to the ignorant erroneous and false Reports of News-Papers, monthly Historians, and Collectors for Book-Sellers; or, (what is perhaps still worse,) to the posthumous Publication of defective and imperfect Notes of Gentlemen who cursorily took them, merely for their own Use and as Helps to their own Memories, without any thoughts of making them public.

I have the Pleasure of thinking that if my Reports have no other Merit, they have at least anticipated, and may possibly tend to prevent such kind of Publications. And for this Reason, I wish to proceed in communicating to the Public the Materials which I have collected, subsequent to the present Publication, and up to the present Time.

Inner Temple, 20th May 1776.

The End of *Hilary* Term 1770. 10 G. 3.

and of the FOURTH VOLUME.

A

T A B L E

O F T H E

P R I N C I P A L M A T T E R S

Contained in *this* Volume.

Action

FOR a *malicious Prosecution*—must be grounded on *two* Essentials; *viz.* *Malice* (express or implied;) and *Want of probable Cause.* 1974.

On the Case, for *Money had and received to the Plaintiff's Use*, ought to be brought against the *Principal*; not against a *Receiver* or *Collector*. The *Right* can't properly be tried in the latter. 1985, 1986.

For *Criminal Conversation* with Plaintiff's Wife—

1st. Evidence must be given of a *Marriage in Fact.* 2059.

2dly. *Cohabitation, Reputation,* or other Circumstances from which it may be *inferred only*, do not amount to Evidence of an *Actual Marriage.* *ibid.*

For *Money had and received to Plaintiff's Use*—The Plaintiff can recover no more than what he is in *Conscience and Equity* intitled to. 2134. *v. supra*, under pa. 1010, 1011, 1012.

By a *Reversioner*, will lie, for an Injury done to the *Value of the Inheritance.* 2141.

For *Slander of Title.* 2422 to 2426. See *Slander of Title.*

Of *Debt upon a Judgment* will not lie, after the Defendant has been taken in Execution on a *Co. Sa.* and *discharged by Consent of the Plaintiff.* 2483. See *Pleading.*

A T A B L E of the Principal Matters.

Affidavit

Of the Truth of the *Suggestion* for a *Prohibition*. 2035, and 2037 to 2041. See *Prohibition*.

To hold to *special Bail*. 1992 to 1997. See *Bail*.

Where necessary, to ground a *Prohibition*. 2032, 2039, 2040. See *Prohibition*.

Ambassador.

Domestic Servant privileged by 7 *Ann. c. 12*.

1st. Must shew that he was in the Service at the *Time* when arrested. 2017.

2dly. This Act is agreeable to the *Law of Nations*; which is Part of the Law of England. 2016. V. *supra*, 148, 1481.

3dly. The *Registering the Name* &c, under the 5th Section, is not a Condition precedent to being intitled to the Privilege: It relates only to proceeding against the Person arresting. 2017.

Amendment

Here in England, of a Judgment in Ireland. 2156, 2157.

In *Ejectment*—The Declaration was amended, by altering the *Time of the Demise*; where the Plaintiff would have been *barred* by a Fine, from bringing a new Ejectment. 2448, 2449. v. *supra*, 1162.

Of an *Information for a Misdemeanour*, by striking out the Word "*Purport*" and inserting the Word "*Tenour*," made by a Judge at Chambers, the Day before the Trial, upon hearing both Sides, but *without Consent* on the Part of the Defendant, was holden to be allowable and regular. 2527 to 2533. See *Information*.

Apprenticeship.

John Rowe went to live with *John Steward* a Freeman of Colchester, at or before Michaelmas 1731, upon Liking, in order to his being bound Apprentice; and continued to live with and serve his Master in *that Manner*, till the 24th of July 1732; WHEN he was bound Apprentice to him by Indenture, for Seven Years, to commence from the said Michaelmas 1731. He continued to live with and serve him under the said Indenture, from the said 24th of July 1732 until within about a Year and

A TABLE of the Principal Matters.

and an Half of the End of the Term of Seven Years; when an Indorsement was made on the Indenture, whereby his Master *let* him to a *Non-Freeman*, for the *Residue* of his Time; with whom he lived and served, the Remainder of the said Term.

Qu. Whether *this Binding and Service* are *sufficient* to intitle the Apprentice to be admitted and sworn a *Free Burgefs*, under a Custom "That every Person who had served an Apprenticeship, by Indenture, for the Term of Seven Years, to any Freeman, had a Right to be admitted and sworn a Freeman or sworn Burgefs &c." 2287.

A *Journeyman* is not liable to the *Penalty* of 5 *Eliz. c. 4. § 31.* for not having served an Apprenticeship. 2449, 2450. v. *supra*, (1st and 2d Articles,) and *Title Trade and Trader*.

Artificers.

Seducing them abroad. 2026. See *Sentence, Statutes*.

Whose Living is substantially gotten by *Mechanical Labour*, with a *Mixture* of buying and selling are, upon the Authority of *Cases*, liable to Commissioners of Bankruptcy: Though the Court were sensible of the Inconvenience of holding them so. 2148.

Attachment.

The Defendant can't come in and *acknowledge* the Contempt, and submit to Punishment, before or without answering Interrogatories. Unless it be in the Case of a *Rescue* returned. 2129, 2130.

Attorney

Has *Privilege* to keep the *Venue* in MIDDLESEX, when *Plaintiff*; but *not* to CHANGE it *thither*, when he is *Defendant*. 2027 to 2032. See *Venue*.

Neglecting to charge the Defendant being in Custody, with a Declaration, *within two Terms*; by which Omission, the Defendant obtained his Discharge; is *liable to an Action* by the Plaintiff; (and 500*l.* Damages have been actually given by a Jury, in such an Action.) But the Court will not proceed against him for it, in a *summary* Way: It ought to be left to a Jury, as to the *Quantum* of the Damages. 2060 to 2063.

Knowing a Case to be *out of the Jurisdiction*, or *exceeding the Bounds of his Duty*, may be *answerable as a Trespasser*. 2109.

Privilege is the Privilege of the Court he belongs to: Not his own, personally. (This was in C. B.) 2113 to 2116.

Privilege

A T A B L E of the Principal Matters.

Privilege continues no longer than he remains an *acting* Attorney of his Court. *ibidem*.

Privilege exempts him from serving *Sheriff* of his Corporation; though he was *resident* in the Corporation before and when he was admitted an Attorney of C. B. *ibid*.

Authors

Have not by the *Common-Law*, the *sole and exclusive Copy-Right* remaining in themselves or their Assigns in *Perpetuity*, after having *printed and published* their Compositions. 2409.

But by the *Statute* of 8 *Ann. c. 19*. it is secured to them for *Fourteen Years* from the Day of publishing: And after the End of *Fourteen Years*, the sole Right of printing or disposing of Copies shall return to the Authors, *if* then living, for other *Fourteen Years*. *ibid*.

Bail.

Common: Special—The Plaintiff's *Assignees* under a Commission of *Bankruptcy*, swear to the Debt, "*as appears to them* by the "*last Examination of the Bankrupts*, and as these Depo-
" nents *verily believe*;" And that they have *not received* the Debt or any Part of it, but *believe it* to be *still due*. The Bankrupts had given in an Account of this Debt upon their Examination; to the Truth of which they had sworn, to the best of their Remembrance and Belief: But they *refused to swear* it in an Affidavit to hold the Defendant (their Father in Law) to Bail. The Court held him to Bail. 1992 to 1996. v. *supra*, 655. 1032. 1447. 1687. and *infra*, 2126. 2283.

In a Civil Action, for a Person *convicted of Felony*, are too late to have a *Certiorari* to bring up the Principal to be *surrendered* in their own Discharge, after he is *actually on Board* for Transportation. 2034.

Excepted to, but *not struck off* the Bail-piece, may, if afterwards attacked, apply for an *Exoneratur*; which shall be entered *nunc pro tunc*. 2107.

Common: Special. In an Action of *Debt upon a Judgment*, where the Original Cause of Action was *under 10*l**. but (by the Addition of Costs) the *Judgment exceeds 10*l**. The Common Pleas require *Special Bail*: *This Court*, only *Common*. 2117, 2118.

Common: Special. Affirmation "*that the Defendant was justly*
"*and truly indebted to the Plaintiff in 5000*l*. for so much*
"*Money had and received of the Affirmant: For which, he*
"*has not accounted.*" These last Words render it *not positive*. He was discharged on filing *Common Bail*. 2126, 2127.

A TABLE of the Principal Matters.

Have Time to *surrender their Principal*, till the *Quarto die post* (provided it be done *ſedente Curia*,) where the Action is by ORIGINAL. 2134.

Lord B. charged poſitively with a *Rape*, and Two Women acceſſary before the Fact, were admitted to Bail, by Four Manu- captors: His Lordſhip, 4000*l.* and 4000*l.* The Women, in 400*l.* and 400*l.* each. 2179.

Common: Special. Swearing to *Belief*, and as certainly as the Nature of the Thing will bear, is ſufficient, where the Plain- tiff is an *Executor*, or *Adminiſtrator*, or *Aſſignee* under a Com- miſſion of Bankruptcy. 2283. v. *ſupra*, 1992, &c.

In *Error*, upon a Judgment in Ejectment—juſtify in *double the Rent*. 2502. See *Error*.

After Bail had *juſtified*, Plaintiff (without diſcloſing this) ob- tained a Side-Bar Rule “to diſcontinue on Payment of Coſts;” and brought a *new Action*. The Court diſcharged the Side-Bar Rule. 2502, 2503.

Landed Property in JAMAICA does not qualify to juſtify as ſuffi- cient Bail; becauſe not liable to the Proceſs of this Court. 2526, 2527.

Or Security to be taken by the *Sheriff*, on a *Capias utlagatum*, purſuant to 4, 5 *W. & M. c.* 18. 2537 to 2542. See *Out- lawry, Statutes*.

A Perſon in Cuſtody upon a *Capias utlagatum* after *Conviction* of a Criminal Miſdemeanour can not be admitted to Bail, *with- out Conſent* of the Proſecutor. *ibid.* For he is in *Execution*. 2545 to 2549.

Bankrupt.

An *Inn-keeper*, quatenus Inn-keeper, is not within the Bankrupt- Laws. 2068.

Nor a *Victualler*, quatenus Victualler. *ibid.* and 2065 to 2069.

But a *Butcher* is, (as well as a Shoemaker.) 2148.

The Court ſaw the Inconvenience of extending the Bankrupt- Laws to *Artificers* whoſe Living is *ſubſtantially* gotten by *me- chanical* Labour with a *Mixture of buying and ſelling*: But they thought themſelves bound by the Authority of Caſes. *ibid.*

Ann and Isaac Scott were *Partners*. *Isaac*, on the 27th of *March*, abſconded. On the 28th he ſent to *Rolleſton*, a Creditor of the Partnership, a Letter from *Dover* incloſing a Bill of Par- cels dated the 23d of *March*, of Seven Bags of *Cochineal*, as if *Rolleſton* had purchaſed them of *Ann and Isaac Scott*; (which was not at all true;) informing him “that he had depoſited “them at a public Warehouse, in *Rolleſton*’s Name and for “his Uſe;” (which he had done on the 26th, and they were ſo booked; but *Rolleſton* did not know it.) On the 30th, *Rol-*

A TABLE of the Principal Matters.

leston went to the Warehouse; found them there; sold them and applied the Produce to his own Use, in Part of Payment of the Debt due to him from the Partnership. This Transaction of *Isaac's* is *fraudulent*, and *void*, and shall have no Effect to intitle *Rolleston* either to the Moiety of *Isaac* or the Moiety of *Ann*. 2174 to 2177.

La Roche and *Wilting*, being possessed of a promissory Note of *Bryer* and *Everard* payable to them or Order, for 600*l.* indorsed it to *Temple*, to whom they were indebted to a larger Amount; and, the same Morning (being *Friday*) sent it in a Letter to him at *Trowbridge*: Which Letter was received by him there on *Monday*, and could not be so before. *La Roche* and *Wilting* committed Acts of Bankruptcy on the intermediate *Saturday*. They had given *Bryer* and *Everard* Two Notes for 300*l.* each; which had not been discharged. It was stated "that the said Note was so indorsed and sent to the said Defendant (*Temple*) in Contemplation of their Insolvency and subsequent Failure." Judgment was given for the Plaintiffs, the Assignees, who had brought Trover against *Temple* for this Note: For, the Indorsement and sending of the Note to *Temple* was *fraudulent* upon all the other Creditors, and particularly *Bryer* and *Everard*. 2235, &c.

1st. If Bills of Exchange are sent, or Goods consigned to a Person who *has paid the Value* before; and the Sender becomes Bankrupt; the Assignees shall not take them back, though the Person to whom they were sent did not then know of their being sent: But if the Consideration has *not been received*, The Court of Chancery always interposes. 2239.

2d. *Fraudulent Conveyances* are Acts of Bankruptcy. *ibid.* and 2240.

3d. All Acts to defraud Creditors, are *void*. *ibid.*

4th. An insolvent Creditor can not go *out of the Common Course* of Trade and Business, to prefer a particular Creditor or Creditors. *ibid.*

5th. *Assent* is necessary to *complete* every Contract. 2241. Conforming to the Statutes, is *discharged* (by 5 G. 2. c. 30. § 7.) from all Debts *due or owing* at the Time of his becoming Bankrupt. But *contingent* Ones, not proveable under the Commission, are *not* discharged by the Certificate. 2444.

A *collateral, independant*, express Covenant by an Assignee of a Lease, "to indemnify the Assignor," is *not discharged* (with respect to subsequent Breaches,) by the Assignee's becoming Bankrupt, the Assignment of his Effects, and his obtaining a Certificate: It was *not* a Debt due or owing at the Time of his becoming Bankrupt; and the Assignor could not prove it as such, under the Commission. *ibid.* and 2446.

A TABLE of the Principal Matters.

A *fraudulent Sale* of Goods by the Bankrupt to *One* of his Creditors, in Concert and *Combination* to keep up the Bankrupt's sinking Credit, in order to *prefer* this One Creditor and *cheat* Others, is *void*, (though it may not be an Act of Bankruptcy in itself,) and does *not alter the Property* of the Goods: And TROVER will lie, by the *Assignees*, for the Goods. 2477 to 2482.

Barbers

Of *London*—Incorporated with the Surgeons of *London*, by 32 H. 8. c. 42. Separated by 18 G. 2. c. 15. Which latter Statute *only dissolves the Union*, but does not repeal the 4th and 5th Sections of the former. 2133. See *Surgeons*.

Baron and Femme.

A Wife *ill used* by her Husband shall not be delivered to him, but protected against any Insult from him. 1971. See *Habeas Corpus*.

A *voluntary Pension* from the Crown, *during Pleasure*, shall not excuse the *Husband* from being liable to be *sued by her Creditors* by whom she was supplied with Necessaries. 2177, 2178.

Bigamy.

Evidence of it. A Marriage *in Fact* must be proved. 2058, 2059. See *Evidence*.

Bonds.

To *reimburse a Compounder of Differences of Stocks*, the half of what he had paid for himself and a Person *jointly concerned* with him in the Contracts compounded—is not void by 7 G. 2. c. 8. § 5. 2069 to 2072. See *Stock-jobbing*.

Bribery

At Elections to Parliament—See *Statutes* (2 G. 2. c. 24.)

At Elections to Parliament—Evidence to support the Declaration. 2268, 2269. See *Evidence*. And again 2275, 2276. See *Evidence*.

At Elections to Parliament—The Offender, *discovering* another so as to be convicted, and not having been before *that Time* himself convicted, shall be indemnified and discharged of all Penalties and Disabilities: 2 G. c. 24. § 8. 2286.

1st. It

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1st. It is not necessary that the original Discoverer should be the *Prosecutor*: He may be a *Witness*. *ibid.* v. *infra*. 2468.

2d. "Before *that Time*"—relates to the Time of *making* the original Discovery; not to the Time of giving Evidence at the *Trial*. *ibid.*

3d. A *Verdict* alone is not a *Conviction*: It must be completed by *Judgment*. But when so completed, it shall *relate back* to the Time of the first Discovery. *ibid.*

4th. How a Discoverer fairly intitled to his Indemnity may be *relieved*. *ibid.*

At Elections to *Parliament*. The Offender *discovering*—Where indemnified. See 2 G. 2. c. 24. § 8.

1st. If sued, he may plead "*Nil debet*," and give his *Excuse* in Evidence. 2469, 2470.

2dly. A *Witness* in a former Suit brought against him was held the *Discoverer*; and that the *Prosecutor* of that Suit could *not* be considered as the Discoverer. *ibid.* v. *supra* (under 2468. Subdivision 1st.)

No *Damages* for *Detention* of the Debt, in an Action of Debt on the 7th Section of the above Statute. 2490, 2491. See *Error*.

Offering Money to a Privy Counsellor, to procure the Reversion of an *Office* in the Gift of the Crown, is a Misdemeanour at Common-Law, and punishable by Information. This was an Offer of 5000*l.* to the Duke of *Grafton*, then first Lord of the Treasury, to procure the Reversion of the Office of Clerk of the Supreme Court of the Island of *Jamaica*: Which Office is granted under the Great Seal, and consequently must be governed by the Laws of *England*; and was not in the Duke's particular Department. The *Attempt* to induce him to advise the King, under the Influence of a Bribe, is *criminal*; though never carried into Execution. 2499, 2500.

At Elections to *Parliament*—The Act of 2 G. 2. c. 24. does not *make* the Plaintiff in the Action the *Discoverer*; nor *consider* him as the *Discoverer*, conclusively: It is not to be *presumed* that he was so, *without any Evidence* of it. Yet the Court will not say "That the Plaintiff in the Action *cannot* be the *Discoverer*." 2504, 2505. v. *supra* (under 2286, and 2469.)

Broker.

A Person who, for Brokage and Hire, negotiates and concludes Bargains for *Stocks*, is a Broker within 6 Ann. c. 16. § 5. 2104.

Buildings.

Party-Walls. 2298. See *Statutes* (11 G. 1. c. 28.)

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By-Law.

A By-Law "that no *Stranger* nor *Foreigner* shall use the Craft " of a Taylor within the City of *Bath*, except he be *first made* " *free* of the said City;" founded on a Custom "that no " *Stranger-Person* hath of Right used or of Right ought to " use the Craft of a Taylor within the City aforesaid, except " he be free of the said City;" is a *good* By-Law. 1952.

Of the *College of Physicians*. 2186 to 2203. See *Physicians*. And v. *supra*, under pa. 1833.

A *Corporation by Charter* can't make By-Laws *inconsistent* with the *Intention*, or *counteracting* the *Directions* of their Charter. 2207, 2208.

In the abovementioned Case (1827 to 1840 of the Third Vol.) the Common Council of *Maidstone* made a new By-Law *confining* the Election of Common Council Men to the *Sixty Seniors* of the Common Freemen (about 900. in all,) *exclusive* of the Rest. It was holden *bad*, and *contrary* to the Intent of their Charter. *ibidem*.

"That *any* Person or Persons (not being intitled to Freedom by " Birth or Servitude) should be thereafter admitted to it, upon " Payment of the PRICE or *Sum* of *Ten Pounds* &c, with the " usual and accustomed Fees"—is a *bad* By-Law. 2260 to 2267.

Charter gives the *Power of making By-Laws*, to the *Mayor and Aldermen*; and the *Right of Election* of Freemen and Burgessees to the Mayor Aldermen and *Commonalty*. The Mayor and Aldermen, *with the Assent of the Commonalty*, make a By-Law to *exclude the Commonalty*. 2515 to 2521.

1st. It was objected, "that the Corporation has no Power to exclude an *integral Part* of the Body, when the *Charter* has given them the *Right of electing*. *ibid.* v. *supra*. 1833.

2dly. This By-Law, MADE by the Mayor and Aldermen alone, though *assented to* by the *Commonalty*, can't take away their Right of electing. 2521.

Capias ad Satisfaciendum.

After the Defendant has been taken in Execution on a *Ca. Sa.* and *discharged* by the Consent of the Plaintiff, an Action of *Debt upon the old Judgment* will not lie against him. 2483. See *Pleading*.

Carrier.

A *Bailee* is only obliged to keep the Thing delivered to his Care, as he would keep his *own*: But a Common Carrier, in respect
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of the *Premium*, must make good the Loss, though not in Fault, or even if robbed. 2298 to 2302.

But the *Reward* ought to bear Proportion to the *Risque*. *ibid*

He ought therefore to have more for carrying *Money* or *Jewels*, than for common ordinary Goods. *ibid*.

If *Money* or *Jewels* are sent by him, denying or *concealing* that it is *Money* or *Jewels*, he is *not answerable* for the Loss of them. *ibid*.

A Common Carrier may *accept specially*. *ibid*. He may *refuse* to contract, in extraordinary Cases, without extraordinary Terms. 2302. He shall be answerable for *no more* than he is told of; not for what is *concealed* from him, and he is *deceived*: For, *ex dolo malo non oritur Actio*. 2301, 2302.

Cases doubted or denied.

Penfold, Mariner, and Five Others, in Sir T. Jones, 197, 198. and 2 Salk. 589. Anonymous. See *Rescue*. 2130.

Sir Laptist Hicks against Goats, denied as reported in 2 Ro. Abr. 703. Title "Trial," pl. 9. but confirmed as reported in Cro. Jac. 390. 2229, 2230, 2231.

Kenrig v. Eggleston, Alcyne 93.

The cited Case in 1 Ventris 238.

Titchburne v. White, 1 Strange 145. } 2299 to 2302. See *Carrier*.

Certiorari,

To bring up a Principal to be *surrendered in Discharge of his Bail*, shall not be granted, where such Principal is a *Felon* under Sentence of Transportation, and actually *on board a Transport*. 2034.

Brought *by a Defendant*, to remove an Indictment; and a *Recognizance* entered into, pursuant to 5, 6 W. & M. c. 11. § 2 & 3. and the Defendant *convicted and fined*; and the Prosecutor has *received the one third of the Fine*; and then applies for his Costs *under the Recognizance*: He shall *not have Both*; but so much shall be *deducted*, as he has received for the one-third of the Fine. 2126. See *Costs*.

Lies on 8 Ann. c. 25. a *private Act*, about bringing fresh Water into *Liverpool*. 2244. And the Proceedings were quashed, because the Foundation of this inferior Jurisdiction was *not set out*. *ibid*.

Lies to a *Welch Quarter-Sessions* of the Peace, to remove an Indictment up into the *King's Bench*, (passing over the Grand Sessions.) 2457 to 2460.

The *King* has a Right to *demand a Certiorari*, where the *Crown* is interested or concerned. *ibidem*.

But

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But to a *Common* Prosecutor (where the Crown is not concerned, but the *King's Name* only used as of Course,) it may be either granted or refused, at the *Discretion* of the Court. *ibidem*.

A *Defendant* can never demand One: He must lay sufficient *Grounds*, to obtain either a *Certiorari* or a *Procedendo*. *ibidem*.

Superfeded, quia improvidè emanavit; the Return taken off the File; and Orders remanded; The *Certiorari* being taken away by 32 G. 2. c. 54. (a Road Act.) 2522.

Commitment

By two Justices of Peace, on the *Information and Request* of an *Ecclesiastical Judge*, to have their *Assistance and Aid*, in a Cause for *Subtraction of Tithes*, pursuant to 27 H. 8. c. 20. § 1. The proper Form and Regularity of the *Certificate* and *Commitment* were fully discussed; and particularly, whether such Request could be made *before Sentence*. 2095 to 2100. See *Statutes, Tithes*.

Common Carrier. See Carrier.

Common: Commoner.

For an *Overcharge*, the Commoner had anciently two *Remedies*, viz. an *Affize*, if surcharged by the Lord; a Writ of *Admeasurement*, if surcharged by a *Fellow Commoner*: An *Action on the case* also may be maintained against *Either*. But he can not *distrain*, wherever there is *COLOUR of Right*: Though he may *distrain* the Cattle of a *Stranger*, or even of the Lord, if he be *totally excluded* by a Custom. He can not *distrain* a *Fellow-Commoner's* Cattle, as surcharged; where the Number allowed *depends upon the Number of Acres*, or requires a *Medium* to determine the proper Proportion, or depends upon a collateral Fact, or upon Matter of Judgment. 2426 to 2432.

Yet *Qu*. Whether a Commoner has not a Right to *distrain* the Surplus Cattle of a *Fellow-Commoner* who is stinted to a Number *absolutely certain*, and exceeds such *absolutely ascertained* Number. 2431. But where the Right of Common is for Cattle *levant and couchant*, One Commoner can not *distrain* the Cattle of Another, for a supposed *Overcharge*. *ibid*.

Common Recovery,

Where void by 34, 35 H. c. 20. the Donee being Tenant in Tail, of the *Gift of the Crown*, and the *Reversion in the Crown*. 2224. See *Statutes* (34, 35 H. 8. c. 20.)

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Condition.

A Condition may, in some Cases, be construed a *Limitation*.
1941 to 1944. See *Limitation, Devise*.

Condition Precedent,

In Restraint of Marriage—Ought to be construed with the utmost Rigour and Strictness, in Favour of Devisees attempted to be so restrained. 2055 to 2057.

Contempt—See Attachment, Practice.

Contracts.

Executory Contracts for Goods are not within 29 C. 2. c. 3. § 17.
2101, 2102.

Conveyance.

The *Whole* of a Conveyance shall be *taken together*: And the several Parts of it shall *relate back* to the *principal* Part. 1962.

Convict,

Actually *on board a Transport*, shall not be brought up by *Certiorari*, to be surrendered by his Bail in a Civil Action. 2034.

Convictions.

Upon Convictions, it is necessary to *set out the Evidence*; that the Court may judge whether the Justices have done right, or not.
2063, 2064.

Summary Convictions ought to be kept to proper Degree of Strictness. 2281. v. *supra*, 153, 154, and 682. of Vol. 1 & 2.
On 5 G. 3. c. 14. § 3. “for the more effectual Preservation of *Fish*, in Fishponds and other Waters.

1st. If it be not necessary that the Complaint to the Justice must be made *by the Owner*. 2281.

2dly. It is, at least necessary that it should appear “that
“the Fishing was *without Consent* of the Owner.” 2282.

Copyhold.

Blackwell North, a Copyholder in *Fee*, surrendered (out of Court) in 1724, to the Uses of his Marriage-Settlement, with Reversion

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sion to himself in Fee. In 1725, he surrendered to the Uses of his Will. In 1743, he made his Will. In 1751, the Surrender of 1724 was presented; and he was admitted according to the Tenor of it. Adjudged "That his Admission in 1751 was *no* "Revocation of his Will made in 1743." For

1st. The *Reversion* in Fee remained in him, after the Surrender in 1724. 1960, 1961, 1962.

2dly. No Alteration or Change of Estate happened upon his Admission in 1751. *ibidem*.

3dly. The Admission relates back to the Time of the Surrender, and is only a Completion of it. *ibid*.

Corporation, Corporator.

After TWENTY Years *unimpeached Possession* of a Corporate Franchise, no Rule shall be granted, "to shew by *what Right* the "Possessor holds it." 1962, 1963.

But UNDER *Twenty Years*, every Case must depend upon its *own particular Circumstances*. *ibid*.

In a Case of *Nineteen Years and Eight Months*, where the Circumstances were very strong in Favour of the Possessor, and against those who moved for the Information against him, the Court discharged the Rule *with Costs*. *ibid*.

Recorder—His Duty and Office. 1999 to 2008. See *Recorder*.

An Election *merely colourable*—is as *no Election* and clearly void within 11 G. 1. c. 4. 2008 to 2011. See *Statutes, Mandamus*.

A Corporate Officer elected under a *Mandamus* pursuant to 11 G. 1. c. 4. § 4. must be sworn in before the Officer PRESIDING at *such election*. 2132.

A new Trial was granted; the Question having never been fully before the Jury. 2139, 2140.

1st. Question—Whether the Presence of a Mayor *de Facto* (not a mere Usurper,) is sufficient to authenticate an Election. *ibid*.

2dly. Whether, in a *Derivative Title, Possession* under Colour of a Title, is not sufficient, without a strict Title *de Jure*. *ibid*.

3dly. Whether a Swearing before Three Persons *as Aldermen*, and so set forth, will let the Defendant in to give Evidence of a Swearing *before the presiding Officer*; which One of the Three in Fact was. *ibid*.

No Person can be *obliged to be a Member* of a Corporation, without his *Consent*. 2199 to 2201.

By-Charter—can't make *By-Laws* inconsistent with the *Directions* or *counteracting the Intention* of their *Charter*. 2208. See *By-Law*.

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Charter directs *Two* Bailiffs—If the Corporation *choose only One*; or One be *ousted* by a Judgment of Ouster; the *One alone* can not Act. 2243.

Have such an Interest in the *Mayor's Title* to his Office, that he shall not be permitted to *give it up*, when those whose Rights depend upon it are desirous to maintain it, *without any Expence to him*. 2279.

The *Point of Limitation* fixed in the *Winchelsea* Causes “of not granting Informations in Nature of *Quo Warranto*, after “Twenty Years quiet Possession,” (v. *supra*, under pa. 1962, 1963.) was *strictly adhered to*. 2524, 2525.

Costs

By an *Executor* or *Administrator*, upon *discontinuing*—

1st. He shall *pay Costs*, where it is his *own Fault*, or Laches:

But

2d. He shall have Leave to *discontinue without* paying Costs, if it be a *fair Transaction*. 1928, 1929. v. *supra*, 1585.

On discharging a Rule to shew Cause why an Information in Nature of *Quo Warranto* should not be granted; the Application being groundless and unreasonable. 1965. See *Information in Nature of Quo Warranto; also Corporation, Corporator*.

On a *Remanet*. 1987 to 1990. See *Remanet*.

Security for answering them, shall *not* be required of a *Plaintiff* gone abroad, and having left no Effects in *England*. 2105. v. *supra* (under pa. 1026.)

Rule to shew Cause why they should not be paid to the *Prosecutor*, *out of the Money levied* upon a forfeited Recognizance. 2119. See *Practice, Recognizance*.

Upon a *Recognizance* entered into on the Defendant's removing an Indictment by *Certiorari*, pursuant to 5, 6 *W. 3. c. 11. § 2. 3.* (made perpetual by 8, 9 *W. 3. c. 33.*) are to be taxed upon *Conviction &c.* But if the Defendant has been *fined*, and the *Prosecutor* has *received the one-third of the Fine*; so much shall be *deducted* out of the Sum allowed him for Costs. 2126.

On a *Reference* which takes *no Effect*. See *Practice, Remanet*.

Covenant.

An *express collateral Covenant* “to indemnify,” shall bind a *Bankrupt*. 2446. See *Bankrupt*.

Damages.

The *Quantum* of Damages, in an Action of Covenant, may be assessed by the Jury, where the precise Sum is not the Essence of
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of the Agreement: But where the *precise Sum* is ascertained fixed and agreed upon between the contending Parties, *that very Sum* so fixed upon by the Agreement of the Parties is the *Measure* of the Damages; and the Jury can't give *less*. 2226 to 2233.

Debtors

Insolvent. 2120. 2127. See *Prisoners, Statutes*.

Declaration

Against a *Defendant in Custody*—omitted to be delivered *before the End of the second Term*: The *Attorney* for the Plaintiff is liable to an *Action* for his Neglect; but not to a *summary Proceeding*. 2060 to 2062. See *Attorney, Practice, Statutes*, (4, 5 *W. & M. c.* 21.) and *ante*, pa 1788.

By the *By*. Where the Proceeding is by *Fill*, If a Defendant is *in Court*, either by being in *actual Custody* of the Marshal, or by a *voluntary Appearance* at any Plaintiff's Suit, *any OTHER Plaintiff* is at Liberty to deliver a Declaration by the *By*, against him, *within the same Term* wherein the Writ was returnable. 2181.

Varying from the Process. 2417. See *Variance*.

In *Trespass*—for *taking goods*—The Particulars must be *specified*. 2456.

Deed—

Where the *Production* of it, in Evidence, is necessary. 2484 to 2489.

Devise

To the Testator's Sister *Dorcas Wykes*, for Life; and after her Decease, to his Nephew *Ambrose Saunders* and the *Heirs Male of his Body* and the *Heirs Male of their Bodies*; and for want of such Issue, to the *Heirs Male of the Body of his Sister Dorcas Wykes* and the *Heirs Male of their Body*; Remainder to *Ambrose Corrie* and the *Heirs Male of his Body* and the *Heirs Male of their Body*; Remainder to the *Heirs of the Body* of his Nephew *Ambrose Saunders*; Remainder to the *Heirs of the Body* of his Sister *Dorcas Wykes*; Remainder to his Kinsman *Robert Ekins*, in Tail Male; Remainder to his own right Heirs:
“ PROVIDED, and this Devise is expressly upon this *Condition*,
“ That *whenever* it shall happen that the said Estates shall def-
“ cend or *come unto any* of the Persons herein before named,
“ the Person or Persons to whom the same, from Time to
“ Time,

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“ Time, shall descend or come, do or shall THEN *charge their*
 “ *Surname*, and take upon them and their Heirs the Surname
 “ of WYKES *only*, and *not otherwise*.” In this Proviso, there
 is *no Devise over*. But in a Proviso which immediately follows,
 prohibiting Waste, without Consent of the Person to whom
 the Premises shall next come, there is a Devise over “ to the
 “ Person next intitled expectant upon the Death of the Wa-
 “ ster,” of the *Part wasted*; And so *toties quoties*, on every
Waste by the Person in Possession, without Consent of the next
 Expectant. The Testator died in May 1742. His THEN Co-
 heirs were his Sister Dorcas Wykes, and the said Ambrose Saun-
 ders, the only Son of Sarah Saunders, his other Sister, then
 deceased. Dorcas Wykes entered in January 1747, and enjoyed
 till December 1756; when she died without Issue. Ambrose
 Saunders, then the Testator’s SOLE Heir at Law, entered, and
 enjoyed till October 1765; and then died without Issue; having
 NEVER changed his Surname nor taken the Name of Wykes: But
 he had, in 1759, suffered a Common Recovery, to the Use of
 himself in Fee. In January 1766, Ambrose Corrie entered, for
 Breach of the Proviso by Ambrose Saunders, in not having
 changed his Surname and taken the Name of Wykes. Adjudged
 unanimously, “ that Corrie, the Remainder-Man, had no Title
 to enter. 1929 to 1944.

1st. This Proviso is *not* a Condition precedent; nor is it a
 Conditional Limitation. 1941, 1942, 1943.

2d. In *some* Cases, a Condition may operate as a Limitation: As,
 where there is a *Devise over*; or, where an Estate in Fee
 is given to an Heir at Law upon Condition, and it would
 descend upon himself, on his own Breach of the Condi-
 tion. *ibid*.

3d. In the latter Case, a Conditional Limitation would be
implied; although there were no *Devise over*. *ibid*.

4th. But after an Estate Tail, and no *Devise over*, a Limi-
 tation can *not* be *implied*. *ibid*.

5th. A Conditional Limitation can’t be *implied*, unless ne-
 cessary to *effectuate* the Intention of the Testator. *ibid*.
 In the present Case, such an Implication would be con-
 trary to it: For, the Testator could not mean “ that the
whole Estate Tail should cease. *ibid*.

6th. And a Limitation “ that an Estate Tail shall cease in
 “ *Part*, and not in the Whole,” would be void in Law.
 1941.

7th. This Recovery was well suffered by Ambrose Saunders,
 the Tenant in Tail. It was suffered before any Advan-
 tage was taken of the Breach of the Condition. *ibid*.

8th. And One of the Judges inclined to think that he had
 his *whole Life* for taking the Name. 1943.

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To Trustees, upon Trust for the Testator's only Son, for Life; then to the Use of such Woman as should be his Son's Wife at his Son's Death, for her Life; then, of the Issue of his Son's Body, in Tail; then, of the Testator's own Two Daughters, in Fee: "PROVIDED always, and it was his *very Will, true Intent, and express Meaning*, that in Case his said Son should MARRY with any Woman *not having a competent Marriage-Portion, OR without the Consent and Approbation of the said Trustees* their Heirs or Assigns, in Writing under their Hands and Seals, to be executed in the Presence of Two or more credible Witnesses, first had and obtained; then his said Trustees and their Heirs and Assigns, immediately after the Death of his said Son, should stand and be seised to and for the Use and Behoof of his [the Testator's] said Two Daughters and their Heirs for ever; any Trust, Use, &c &c, notwithstanding." "And his Will, *true Intent and Meaning* was, and he did declare, that the said Proviso or Condition therein before *expressly* mentioned was NOT *intended* by him, *nor to be construed or taken to be IN TERROREM*; but a CONDITION, for Want of Performance whereof *in every respect*, the said Lands &c should in *no Case be vested* in such *Wife* of his said Son, *nor the Heirs of that Marriage*; but, on the contrary, that his said Trustees and their Heirs should stand seised of the Premises to the *only* Use and Behoof of his said Two Daughters and their Heirs, in manner aforesaid."

The Court unanimously held—

- 1st. That all Clauses and Conditions in Wills, in *Restraint of Marriage*, ought to be construed with the *utmost Rigour and Strictness*, against such Restraint, and in Favour of the Person attempted to be restrained. 2055 to 2057.
- 2dly. That this Testator *meant* "that his Son's complying with *either* Part of the Alternative should be a *Performance* of the Condition. *ibidem*."
- 3dly. That the Son did *not* incur a Forfeiture, unless he should break *both* Parts of it: And, consequently, that he did *not* do so by marrying (as the special Verdict found that he did,) a Woman who, at the Time of her Marriage with him, HAD a *competent Marriage Portion*; but he married her WITHOUT any *Consent or Approbation* of the Trustees. *ibid*.

To Coningesby Harris, for Ninety Years, if he shall so long live; and after the *Determination of that Term*, to the Heirs of the Body of the said Coningesby Harris; and in Default of such Issue, to S. E. for Ninety Years, if she so long lives, and to commence from the Death of the said Coningesby Harris, he dying without Issue; and, *subject* to the Estates and Contingencies before mentioned, to Roger Elleston, Son of the

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- said *S. E.* The Court certified “ That it was the *clear mani-
“ fested Intent* of the Testator to give an *Estate Tail* to such Per-
“ son as should be Heir of the Body of *Coringesby Harris* at
“ the Time of the *Death of the said Harris*, and the Heirs of
“ the Body of the said *C. H.* Which Intent may take Effect
“ as an *Executory Devise*; and the *Freehold*, in the mean
“ Time, *descends* to the Testator’s Heir at Law.” And this
effectuates the whole Intent of the Testator. 2157 to 2162.
v. supra (under pa. 51.)
- “ *In Default of Issue of my own Body*, I give devise and bequeath
“ all that my Manor &c &c to *J. A.* and *J. S.* and their Heirs;
“ upon Trust &c &c.” The Testator *died a Bachelor*, and
without Issue. The Trustees took a *FEE, determinable* when
the Purpose of paying the Testator’s Debts Legacies and fu-
neral Expences out of the Rents Issues and Profits of the de-
vised Premises, in Aid of the personal Estate, shall be per-
formed. 2166 to 2171.
- It is now settled “ that *Marriage AND a Child* is a *Revocation* of
a Devise of *personal Estate*: But no Case has yet holden *Mar-
riage alone* to be so. 2171.
- The Reason is the same, as to *Devises of Land*: And it has been
so holden by *Parker, Smythe, Adams, Wilmot, De Grey*; not
so, by *Perrott. ibid.*
- A Will shall be construed according to the *Intention* of the Tes-
tator, if the Words will bear such a Construction. Accord-
ingly, an *imperfect ill worded* Will was construed to carry an
Estate Tail to *all* the Grandsons of the Testator (*Layton*) ex-
cept *William Lowndes Stone*, the Eldest; being the *manifest In-
tention* of the Testator. 2250. See the Case next below this.
- The Rule laid down in *Shelley’s Case*, “ That when the Ancest-
“ tor, by any Gift Devise or Conveyance, takes an Estate for
“ Life, with Remainder (mediately or immediately) to his
“ Heirs, in Fee, or in Tail; the Word *Heirs* is a Word of
“ LIMITATION; and the Estate of *Inheritance* shall vest in the
“ Ancestor; and the *express Limitation for Life* is of no Ef-
“ fect;” was neither doubted nor disputed; (though the *Rea-
son* of it has long since ceased:) Yet the Question “ Whether
“ a Testator’s MANIFEST INTENT may not control the legal
“ Operation of the Word *Heirs*, as a *Limitation*; and turn it
“ into the *Description of a Purchaser*,” remains still unde-
cided, and depending in the House of Lords in *May 1776*.
2579 to 2582.

Distress

Of Cattle surcharged upon a Common. 2426 to 2432. See Com-
moner.

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East-India Company.

Officers and Soldiers in their Service are, by 27 G. 2. c. 9. subjected to Military Law and Courts Marshal. 2420, 2421.

They contract with their *Common Soldiers* for a *stipulated Time*: But their Commissions to their *Officers* are *general and indefinite*. *ibid.*

A Military *Officer* in their Service has *not* a Right to *resign* his Commission, at *all Times* and under *any Circumstances*, *when-ever he pleases*. 2419, 2420.

And, clearly, he is an *Object of their Military Law*, as long as he remains in their Pay and Service. 2472 to 2477.

Ejectment.

Writ of Possession has *Relation to its Tasse*: Though it be not *actually sued out* till after the *Death* of the Lessor of the Plaintiff; yet, if *tested before his Death*, it is regular. 1971.

A *regular judgment* was fairly obtained against the Casual Ejector; the Tenant having *neglected to give Notice to his Landlord*: For which Reason, the Landlord moved to set aside the Judgment. The Landlord was an *Infant*; and therefore could not *consent* to any Issue. 1996, 1997.

1st. The Court held that the *Possession ought not to be changed*, where there had been *no Trial* nor Opportunity of trying. *ibid.*

2dly. They thought they might add *Terms and Conditions* to the Relief they granted to the Infant. *ibid.*

3dly. That the *Tenant* ought to pay the *Costs*. *ibid.*

4thly. They accordingly *set aside* this *regular Judgment* and *Writ of Possession*; and ordered the *Tenant* to pay all the *Costs*: Also, that the Landlord be made Defendant; and *not to set up* any satisfied Term, or Trust-Estate; and to admit that *Z. T.* was seised. *ibid.*

Can't be maintained, *contrary to the Lessor's own Covenant*. 2209. See *Lease*.

A *new Trial* may, upon proper Grounds, be granted in Ejectment-Causes, as well as in others. 2224.

Amendments in Ejectment are now carried much farther than formerly; and may be made even in the *Time of the Demise*, to prevent being barred. 2448, 2449. See *Amendment*.

Where the *Production of a Deed* is necessary, to support the Plaintiff's Title. 2484 to 2489.

Election

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Election

To Parliament. 2270. See *Bribery, Parliament*.

Error

Upon a Judgment in a *Qui tam* Action on 9 *Ann. c.* 14 § 2. for Money won at Play and the Triple Value of it: Which Judgment was affirmed as to the Recovery of the Debt, but reversed as to the Damages and Costs. 2018 to 2022. See *Gaming. v. infra*, 2490, 2491.

A Judgment in *Ireland* may be amended here. 2156.

If brought by a *Plaintiff* below, the Court (upon Reversal) may give such Judgment as the Court below should have given: If brought by the *Defendant* below, they can only reverse. 2156. In this latter Case, they can only reverse so much as the Defendant below complains of. 2490.

In an Action of Debt on 2 *G. 2. c.* 24. § 7. for Bribery at an Election to Parliament, (or in any popular Action,) no Damages can be given for the Detention of the Debt. 2490, 2491. *v. supra*, 2022.

Bail in Error on a Judgment in *Ejectment* justify in Double the Rent. 2502.

Evidence

Of a *Marriage in Fact*—is necessary in an Action for *Criminal Conversation*. 2059. And in Prosecutions for Bigamy. *ibid* What shall amount to Evidence of a Marriage in Fact. *ibid*.

A *Deduction* may be given in Evidence, in an Action for Money had and received to Plaintiff's Use. 2134. See *Set-off*.

Parol Evidence ought not to be admitted, to make a Record wrong, or to defeat Justice. 2270.

In an Action for *Bribery* at an Election to Parliament, on 7, 8 *W. 3. c.* 25. the TIME of Delivering the Precept to the Returning Officer needs not to be proved: For, the Time of delivering it, though material to the Returning Officer, is immaterial to this Third Person. 2276.

Where the Production of a Deed is necessary, to support the Plaintiff's Title in *Ejectment*. 2485 to 2489.

Production of it—shall not in criminal or penal Cases be required from the Defendant, even though he should hold it in his Hand in Court: But in civil Cases, the Court will either force the Party to produce it, (after proper Notice,) though it prove against him; or leave his Refusal to the Jury, as a strong Presumption. 2489.

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Exceptions—See Bill of Exceptions.

To *General Rules*—What Exceptions are implied. 1986 to 1990.
See *Remanet*.

Executor.

In *Covenant* against an Executor, the Judgment must be *de bonis Testatoris*. 2155, 2156.

Factor.

Where a *Bill of Lading* is *indorsed generally*, and the Factor *indorses* it as being his *own Property*, the Question turns upon its being a fair Transaction, *bonâ fide*, upon a valuable Consideration, and without Notice; or its being fraudulent, and a Contrivance to cheat the Principal. 2051.

Fish.

Preservation of it in Fish-Ponds and other Waters. 2279 to 2282. See *Conviction, Statutes* (5 G. 3. c. 14.)

Fishery

In *Navigable Rivers* or *Arms of the Sea*—is *Common* and *Public*. It *primâ facie* belongs to the *Crown*; and the *Presumption* is against any *exclusive Right*: Yet an *exclusive Right* may be *prescribed* for; but the *Proof* lies on the *Claimer* of it. 2165.

In *private Rivers*, *not navigable*, It belongs to the *Lords of the Soil* on each Side. 2164, 2165.

Forfeiture

Of a *public Office* concerning the Administration of Justice—*Non-Attendance* is a Cause of Forfeiture, if *wilful*: But a *mere single Instance* of Absence of a Recorder from a Session, without any aggravating Circumstance, is not so. 1999 to 2008. See *Recorder*.

Gaming.

Sir Thomas Frederick late of *Westminster* in the County of *Middlesex*, Baronet, was summoned (in C. B.) to answer to *Andrew Lookup*, who sued as well for himself as for the Poor of the Parish of *St. Paul Covent-Garden* in the County of *Middlesex*
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aforesaid, in a Plea that he render to the *Poor* of the Parish aforesaid and to the said *Andrew &c.* The Declaration charges the Offence to have been committed "*at Westminster aforesaid.*" The Jury find Parcel of the Debt to be owing to the *Poor* of the said Parish and to the said *Andrew*; and assess his *Damages* by reason of its being detained &c. The Judgment runs thus — "It is considered that the said *Andrew*, who as well &c, "*and the said Poor of the Parish aforesaid, do recover &c.*" "It is also considered that the said *Andrew*, who as well &c, "*do recover against the said Sir Thomas his Damages aforesaid, to &c, and also 55*l.* 19*s.* to the said Andrew who as well &c, at his Request, for his Costs and Charges aforesaid, by the Court here, for the Increase, adjudged.*" On Error brought, Judgment was affirmed, as to the Recovery of the Debt; but reversed as to the *Damages and Costs.* 2018 to 2022.

1st. Objection was, that the Parish of *St. Paul Covent-Garden* don't appear to have any Concern in this Matter; the Offence being laid at *Westminster.* Answer. It is good, after Verdict. *ibid.*

2d. A wrong Venue. Answered, by 24 G. 2. c. 18. § 3. *ibid.*

3d. The Judgment is "that the said *Andrew* AND the said "*Poor* shall recover:" Whereas the 9 Ann. c. 14. § 2. says "the Informer shall recover." Answer. It may be either Way. *ibid.*

4th. A common Informer can not have *Damages* for the Detention of the Debt, nor (consequently) Costs of Increase founded upon such *Damages.* Answer. The good Part of the Judgment may be affirmed; the bad, reversed. *ibid.* And it was accordingly affirmed as to the Recovery of the Debt; but reversed as to the *Damages and Costs.* 2022. See Error.

Cleaning (or Leasing—)

The Right or Privilege, by Law or Custom, of doing it, must be exercised under proper *Circumstances and Restrictions.* 1926, 1927.

Great Seal

Resigned by Lord Camden; delivered to Mr. Charles Yorke; and, on his Death, to Mr. Baron Smythe, Mr. Justice Batburst, and Mr. Justice Aston. 2506.

Habeas

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Habeas Corpus.

Sued out by a *Husband*, against his *Wife's Friends*, to obtain his Wife. It appeared, that he had *used her ill*; and she *swore the Peace* against him. The Court would *not deliver* her to him; but left her at her *own Liberty*, and even ordered a Tipstaff to *protect* her. 1991.

High-Way.

Indictments for not repairing High-Ways have formerly been taken strictly: But, of late, with greater Latitude. 2092.

Statutes relating to public High-Ways—*Timber Carriages* (and Stone) laden with only One *single Piece*, are excepted out of them; though not out of Turnpike Road Acts. 2260. See *Statutes*.

The *Statute* reducing into One, the several *former* made for *amending* and *preserving* them (7 G. 3. c. 42.) directs (in Sect. 1.) Annual Lists to be made in every *September*, at a Parochial Assembly. Qu. *Who* are the *essential Constituents* of that Assembly; so that their *Absence* would invalidate the Acts of the Assembly? 2454. See *Statutes* (7 G. 3. c. 42. § 1.)

The *Repair* of them lies, of Common Right, upon the *whole Parish*: But if a Parish lies in *Two distinct Counties*, an Indictment may be brought against *that Part* of the Parish in which the ruinous Road lies. 2511, 2512.

Horse-Matches—

For *less* than the Value of *Fifty Pounds*, (elsewhere than at *Newmarket* or *Black Hambleton*,) are prohibited by 13 G. 2. c. 19. § 5. 2433.

If *A.* and *B.* run a Match for 25 *l.* each Side, this is a Match for 50 *l.* although *A.* gave *B.* 5 *l.* certain, beforehand, to run it. *ibid.*

Hospitals—

The *Governors* are *not rateable* to the *Poor Tax*; nor the ordinary *Servants*; nor the *Poor* themselves: But *Officers*, who have distinct Apartments for themselves and Families, may be rated. None can be rated, but such Persons who may be considered as *Occupiers*. 2435 to 2442. See *Poor-Tax*.

Husbandry

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Husbandry.

The Right of *Gleaning* (or *Leasing*) must be exercised under proper *Restrictions*. 1926, 1927. See *Gleaning*.

Indictment—

Against *twelve* Defendants, on 1 *J. 1. c. 22. § 5.* quashed; because *several Defendants* were joined in one Indictment. 2046.
On 1 *G. 1. Stat. 2. c. 5. § 5.* against a Person *encouraging and abetting*, by *shouting* and using *Expressions* to incite, as Principal in the second Degree. 2073 to 2086. See *Riot*.

Objections in *Arrest of Judgment*, made and over-ruled. 2084, 2085, 2086. See *Riot*.

1st. Not shewn that the *Judge was of the Quorum*. *ibid.*

2dly. *No Issue joined*, upon the Record. *ibid.*

3dly. *Non constat by whom* the Justices were assigned. *ibid.*

4thly. *Three* were indicted: *Non constat* what became of *two* of them. *ibid.*

For not repairing an ancient and common *King's High-Way* leading FROM the Hamlet of *R.* in the Parish of *H.* in the County of *Middlesex*, towards and unto *Brentford*; and charging “ that
“ a certain *Part* of the said *King's High-Way*, situate in the
“ Parish of *H.* aforesaid in the said County of *Middlesex*, leading
“ from *R. Place-House* IN the said Hamlet of *R.* to *Stroud-*
“ *Gate* in the same Hamlet, in the said Parish of *H.* containing
“ &c. was out of repair, &c. &c.” 2090, 2091, 2092.

1st. Leading from a *Hamlet*, is a sufficient Description of its Beginning. 2092.

2dly. There is *no Inconsistency* between the first Description, and the Description of the Part out of Repair; though *R. Place-House* and *Stroud-Gate* are both described as *in* the Hamlet, but the *High-Way* is (in the Beginning of the Indictment) described as leading *from* the Hamlet. *ibid.*

For *Nuisances*—are not quashed on Motion: They must be demurred to. 2116.

For not repairing a *High-Way*—may be brought against such PART of a Parish as lies in such a County; in Case the *whole* Parish happens to lie within *two distinct Counties*. 2507 to 2512. See *High-Ways*.

Information

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Information.

The Court will not grant an Information for a Misdemeanour, upon a Motion made by the *Attorney-General* on Behalf of the *Crown*; because, if the *Attorney-General* thinks that it ought to be granted, he may grant it *himself*. 2090. v. *supra* (under pa. 1565.) See *Practice*.

Granted against a *Parish-Officer* (Overseer,) for procuring a *Pauper-Man* of another Parish to marry a *Pauper-Woman* of his own Parish, *with Child of a Bastard*; in order to get the Bastard settled in that other Parish. 2106.

For attempting to bribe a *Privy-Counsellor* to procure a *reversionary Patent* of an Office grantable by the King, under the Great Seal. 2494 to 2501. See *Bribery*.

For a Misdemeanour—was amended, the Day before Trial, by a single Judge at Chambers, on hearing both Sides, but *without Consent* on the Part of the Defendant: And this was holden to be allowable and regular. The Amendment was by striking out the Word "*Purport*," wherever it occurred, and inserting instead of it the Word "*Tenor*." 2529 to 2533 and 2566 to 2573.

For Misdemeanours—may be exhibited by the King's *Solicitor-General*, during the *Vacancy* of the Office of *Attorney-General* 2555, 2556. 2575 to 2577. and that, *without suggesting* such *Vacancy*.

Information in Nature of *Quo Warranto*—

Shall not be granted, nor even a Rule to shew Cause, after TWENTY YEARS *quiet unimpeached Possession* of a corporate Franchise. 1962, 1963. But *within* twenty Years, every Case must stand upon its own particular Circumstances: Of which, Length of Time may be one amongst others. *ibid*. And if they are very strong in Favour of the Possession, and against the Application, the Rule to shew Cause may be discharged with *Costs*. 1965.

The above Limitation was confirmed. The Discretion of the Court is to be guided by the Circumstances: Length of Time is *one* of them. 2022 to 2024. 2121. But the Length of Time (Six Years and one half) was not taken into Consideration in *Richard Wardroper's Case*; because his Title to the Franchise was *clear*. 2024, 2025.

It is contrary to the Trust reposed in the Court by 9 *Ann. c. 20*. (which was intended for *speeding* Prosecutions, and to quicken the Removal of Usurpers,) to give Leave to *private* Informers to make use of the *King's* Name and Suit, to call the Validity of a Franchise in Question; when such private Persons apply it under very *unfavourable* Circumstances. 2123, 2124.

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The *previous Conduct* of such private Relators; their *Motives and Views*; and the *Consequences* to the Corporation and to those who may hold Rights dependent upon the Validity of the Right attacked; may be a good Ground of refusing to grant an Information. *ibid.*

If the Defendant fails in the *Title he has set up*, Judgment must be *for the Crown*. He must shew a *complete Title* against the Crown, *at first*; and *can't depart* from the Title he has set up, after it has been found against him: Nor can he plead *several Pleas*. If any *one material Issue* is found for the Crown, the Crown must have Judgment: But the King has no Necessity to traverse any Thing more than the *Title set up* by the Defendant; nor shall the Defendant have a Repleader, after a Verdict found against him. 2145 to 2147.

But if *before Trial* he discovers that he *has pitched* upon the weaker of *two Defences* which he had, he shall have Liberty, *upon proper Terms*, to *quit* it and insist on the *stronger*; *viz.* to withdraw his Plea and plead *de novo*, on Payment of Costs, pleading soon, and taking short Notice of Trial, and the Prosecutor's having Liberty to reply *de novo*. 2148.

One *Bailiff* alone can not do corporate Acts; if the Charter directs *Two*. 2243. See *Corporation*.

Can not be *quashed on Motion*, though both Parties consent: But the Court will *discharge the Recognizance*, if both Sides desire and consent to it. 2297.

Shall not be granted, *after 20 Year's quiet Possession*. 2524. v *supra*, 1962, 1963.

The Day of making the Rule *absolute* for an Information, is the *Period of the Limitation* of the 20 years. *ibid.*

Information, qui tam &c.

The Informer can not *compound*, but by Consent of the Court: (by 18 *Eliz. c. 5. § 3, 4.*) 1929.

On Leave given *to compound*, the *King's Moiety* was ordered to be paid into the Hands of the *Master of the Crown-Office*, for the Use of the Crown. *ibid.*

Ingrossing—

See 5 & 6 *Edw. 6. c. 14. § 3.* for the *Offence*; and § 4. for the Punishment of it.

Inn-Keeper

Is not (*quatenus* Inn-keeper,) within the *Bankrupt-Laws*. 2067 to 2069.

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Interest—

On a Writ of Error brought in the Exchequer-Chamber, upon a Judgment in this Court, and an *Affirmance of the Judgment*, and a *Scire Facias* against the Bail in Error, they used all Methods of *Delay*; so that the Interest of the Sum recovered *exceeded the ordinary Costs*: The Court ordered the Master to allow Interest from the Time of the Affirmance. 2128. v. *supra* (under pa. 1097.)

Issue—

Needs not to be *joined* upon the Record, upon Proceedings of *Oyer & Terminer*, or *Gaol-Delivery*. 2085, 2086.

Judges Orders—

May be appealed from, to the Court; but are *valid*, if *acquiesced in*. If it becomes necessary to enforce a Judge's Order by *Attachment*, there must then indeed be a previous Motion "to make it a *Rule of Court*." 2569 to 2574. See *Amendment, Information*.

Judgment

In *Ireland*—amendable here in *England*. 2157.

De bonis propriis. *ibid*. See *Covenant, Executors, Leases*.

Was entered up, for the Defendant; as of the *Term when it was pronounced*; at which Time he was alive, but is since dead. 2277.

Of *Ouster* against a Mayor, by Default, set aside; and Corporators let in to defend his Right (upon which theirs depended,) at their own Expence. 2279. See *Corporation*.

Jurisdiction—

Inferior ones must *shew* that they have Jurisdiction. 2214. See *Certiorari*.

Justification

Of a *Trespass*—An accidental *involuntary* *Trespass* may be justified: A *voluntary* One can not. 2094. See *Trespass*.

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King's Counsel, &c.

Sir *Fletcher Norton* quitted the Bar. }
Mr. *Wallace* appointed a King's Counsel. } 2297.

Leases—

By the *Master of the Rolls*, under 12 Car. 2. No. 49. 1975. See *Rolls*.

By *Governors of Colleges in Ireland*—must reserve *more than a Moiety of the true Value*, at the *Peril of the LESSEE*. A Lease made by the Provost of *Dublin-College* did *not* reserve more than &c. But the Provost covenanted for himself and *Successors*, to warrant it: But his *Executors* were not named in the Covenant. 2154.

1st. This Lease is *void*. 2157.

2^{dly}. If it was not, *Qu.* Whether the Provost's Covenant would have bound his *Executors*. *ibid*.

3^{dly}. If it would, yet Judgment ought not to be against them *de bonis propriis*. 2156.

The Owner of a House and Brewhouse enters into *Partnership*; assigns one fifth to his Partner; and covenants that the Partner shall reside in the House, and that if he himself dies, his Executor shall renew the Lease to the Partner. He can not maintain an Ejectment against the Partner, contrary to his own Covenant. 2209.

An *Acceptance of a new GOOD Lease* is an *implied Surrender* of a Former. But if the new Lease does not *pass an Interest* according to the Contract and the Intention of the Parties, it shall *not* operate as a Surrender of the former. 1980. and 2213.

Letters.

Qu. Whether *Post-Masters* are *obliged to deliver* them out, *within* Post-Towns; or whether they must be *sent for*. 2149 to 2153.

But, clearly, a Post-Master *can't demand more* than the settled Rates *for sending* them out. *ibid*.

Nor can he depart from or retract an established *Usage* “to deliver them at the Houses.” 2153

It has been since settled, in C. B. generally, “That in *all* Post-Towns, the Post-Master is *bound to deliver* them *at the Houses* of the Inhabitants, on paying the legal Postage *only*.” *ibid*. (in the marginal Note.)

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Lien.

The Courts lean, of late Years, in Favour of Liens, in Cases where there is either

1st. An *express Contract*. 2221.

2^{dly}. Or an *implied one*; from the *Usage of Trade*, or the *Manner of Dealing*. *ibid*.

3^{dly}. Or where the Defendant has acted as a *Factor*. *ibid*.

But where *personal Credit* only is relied upon, there is no Lien, beyond that which is given by the general Rule of Law. 2222.

A *Packer*, being in the Nature of a *Factor*, is intitled to a Lien for the general Balance. 2222.

Limitation

Of Estates—

Conditional Limitation—what it is; and in what Cases it may be *implied*. 1929 to 1944. See *Devise*.

Of Informations in Nature of *Quo Warranto*—was unanimously fixed to *twenty Years* 1963. See *Corporation, Corporator*.

This is analogous to the Limitation of Writs of *Formedon*, and *Entry into Lands*, and also of dormant *Bonds*, Writs of *Error*, Bills of Review, Redemption of Mortgages, and Proof of *Possession* upon bringing *Ejectments*. 1963.

Literary Property

Fully discussed. 2303 to 2417. See *Authors*.

London.

The Court can *not* take *judicial Notice* of the Customs of *London*. 2032.

Calling a Woman "*Whore*," in *London* is actionable there. 2413. See *Prohibition*.

Mandamus

To the *Justices and Clerk of the Peace* of *Derbyshire*, to register and certify a dissenting *Meeting-House*, pursuant to the *Toleration-Act* (1 *W. & M. St. 1. c. 18.*) was granted. 1992.

To restore a *Recorder*. 1999 to 2007. See *Recorder*.

On 11 *G. 1. c. 4. § 2.* shall be granted after an *Election in Fact*, if merely *colourable* and *clearly void*: For, the Words "*no Election*" mean no *due, legal, valid Election*. 2008 to 2011. The present Case was this—The Person elected Mayor, was an *Officer*
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- in the Army, just gone to North-America, without Probability of returning till after the Year would be expired. This election was holden to be merely colourable, and clearly void. ibid.*
- The *Mandamus-Act* (9 Ann. c. 20.) was intended for *speeding* prosecutions, and to *quicken* the Removal of Usurpers. 2122, 2123. See *Information in Nature of Quo Warranto*.
- A *Return* to a *Mandamus* “to admit, or shew Cause to the contrary,” may shew one, or more, or any Number of Causes; provided they be consistent 2045.
- To *restore* an Alderman. *Return*—“That he had, on such a Day
“ (which was a little more than *four Months* before the Amotion)
“ DEPARTED with his Family from the Borough and its Liberties, and *intirely* left the same, with an INTENT to reside
“ with his Family, for the future, *elsewhere*; and did from that
“ Time to and at the Time of his Amotion, continually reside
“ out of the Borough and its Liberties; contrary to the Duty of his Office: And for this Cause, they removed him.” This *Return* was disallowed: This was not a total *Desertion*. 2088, 2089.
- To go to Election, under 11 G. 1. c. 4. § 4. The *Swearing-in* must be before the Officer then *presiding*. 2132.
- If a Person has a RIGHT, without any other specific legal Remedy, a *Mandamus* shall be granted to him. 2186 to 2191. v. *supra*, 1045. 1266. 1639. 1660.
- To grant *Probate* of a Will—A “*Lis pendens* concerning the Validity of it” is a good *Return*. 2295.

Mariner.

- They may all join in a *Suit for Wages*, in the *Admiralty-Court*: And in that Court, the *Ship* is liable to them, as well as the Captain. 1948. And that Court has *Jurisdiction* of their Contracts made in the quite ordinary Way; though it be in *Writing*, and made at Land. 1950.
- But if the Agreement be *special*, or under Seal, a *Prohibition* shall go. 1950, 1951.
- After Sentence, a *Prohibition* shall not go, unless the Want of *Jurisdiction* below appears upon the Face of the Proceedings. 2037, 2038. See *Prohibition*.

Marriage—

- All Conditions in *Restraint* of it ought to be construed with the utmost Rigour and Strictness in Favour of *Devisees* attempted to be so restrained. 2055 to 2057.
- Alone—is no implied *Revocation* of a *Devise*, either real or personal: At least, it hath not yet been so holden by any Case. 2171.

But

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But marrying *and having a Child*, is so as to *personal Estate*; and, it seems, to *real* also. *ibid.* See *Revocation, Devise*.

All Marriage-Contracts are to be looked upon with a *jealous Eye*. 2230.

Such as are in *Restraint of Marriage* are *illegal and void*. *ibid.* to 2234.

The following one is of that Kind—"I do promise Mrs. Catharine Lowe, that I will not marry with any Person *besides herself*: If I do, I agree to pay to the said Catharine Lowe "1000*l* within three Months next after I shall marry any Body *else*. Witness my Hand and Seal &c. *Newsham Peers*." *ibid.* 1st. It is not a Contract "to marry Catharine Lowe." *ibid.*

2dly. Nor is it *mutual*; neither does her Acceptance of it make it mutual and reciprocal. *ibid.*

Marshal.

When a *capital Offender*, being in the Marshal's Custody, is to be executed, the usual *Place* of such Execution is *St. Thomas a Waterings*. 2086.

The *Appointment, Tenure, and Oath* of the Marshal. 2183, 2184. See *Statutes*.

The general Order made upon the Appointment of a *new Marshal*, for the *Recaption* of Prisoners. 2185.

On the Appointment *by the Crown*, of a *new Marshal*, pursuant to 27 G. 2. c. 17. § 2. the *old Tiptaves*, who had been appointed by the late Marshal, were *not* required to give *larger Security* than they had given before. *ibid.*

Master of the Rolls—See Rolls.

Meeting-house—

Mandamus to *register and certify* one, pursuant to the *Toleration-Act* (1 W. & M. St. 1. c. 18.) 1991, 1992. v. *Mandamus*.

Mutual Debts—See Lien, Set-off, Statutes.

It is agreeable to *natural Equity*, that cross Demands should be set off against each other. 2220.

Positive Law first provided for it, in the Case of *Bankrupts*; and afterwards, *incompletely*, by 2 G. 2. c. 22. § 13. and 8 G. 2. c. 24. § 5. 2221.

But, of late Years, Courts lean on the Side of *Liens*. *ibid.* See *Lien*.

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New Trial

For *Excessiveness* of Damages—See *Verdict*.

In an Action for a *malicious Prosecution*—Want of *probable Cause* was objected, but not verified. It is *essential*, as well as *Malice*. See *Action for malicious Prosecution*. 1974.

After two concurring Verdicts, may be granted; upon *sufficient* Circumstances: It is *discretionary*, and depends upon the particular Circumstances. 2109.

It may be granted in *Ejectment*-Cases, as well as in other Cases; upon proper Grounds. 2224, 2225.

Non pros:

For Want of *declaring within Time*, in Trespas against several Defendants, ought to be *joint*; not several, One for each Defendant. 2418.

Non-Suit

May be *set aside*, upon proper Grounds properly supported: As where a Judge at *Nisi prius* Non suits a Plaintiff, and is mistaken. 1986.

Nufance—

Indictments for Nufances are *not quashed on Motion*: They must be *demurred to*. 2116.

Obiter Sayings—

Even of the greatest Judges, are *not to be depended upon*, if contrary to deliberate Determinations. 2068.

Orders

Of Sessions *quashing a Poor-Rate*, upon an Appeal, generally, *without giving any Reason* why they quashed it—is a good Order. They are *not obliged* to specify their Reasons. 2103.

Of Sessions—declared a *Prisoner irrelievable* on 5 G. 2. c. 41. because charged with an *Outlawry*; and remanded him. This *Negative Judgment* is a Nullity. 2120, 2127.

May be *taken of the File*, and remanded, where exclusive Jurisdiction is given to the Justices of Peace. 2522. See *Certiorari*.

Quashing a *Poor-Rate* made on the Governors of St. Bartholomew's

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mew's Hospital. 2435 to 2442. *v. supra*, (under pa. 1063.)
And see *Hospitals, Poor-Tax.*

Orders of Removal.

See the Quarto Edition of my Settlement-Cases.

Outlawry.

The Defendant was outlawed, *after Conviction* upon Two Informations for *Criminal Misdemeanours*. Resolved—

1st. The Defendant ought not (unless under very particular Circumstances,) to come in, *gratis*, in proper Person, at the Return-Day of the *Capias utlagatum*: He ought regularly to come in *Custody of the Sheriff*, by a Return of "*Cepi Corpus.*" 2531 to 2535.

2dly. Outlawry in *Criminal Cases* differs greatly from Outlawry in *Civil Cases*. 2548 to 2555.

3dly. *Wherein* that Difference consists. *ibid.*

4thly. *Before 3 Ann.* A *Writ of Error* in any *criminal Case* was held to be merely *ex gratia*. 2550. But *since 3 Ann.* it ought not to be denied, in Cases under Treason and Felony, *where there is probable Error*: Which the Attorney-General should examine into, before he grants his *Fiat*. Such *Fiat* is previously necessary to the issuing of the *Writ of Error*. 2550, 2551.

5thly. But in Cases of *Treason and Felony*, the *King's Pleasure* "to deny the *Writ*" is conclusive; be the Error ever so manifest. 2551.

6thly. *Since 3 Ann.* It became an important Question, in all Crimes *under Treason and Felony*, "WHAT is an Error." And *since that Time*, the Court has not given Way to *trivial Objections*, though confessed by the Attorney-General. *ibidem.*

7thly. Such an Information may be brought by the King's Solicitor-General; *without suggesting* "that the Office of Attorney-General is vacant." 2553 to 2555.

8thly. Process of Outlawry lies upon *Informations* of this kind. 2556, 2557.

9thly. Every Offence committed *against the Peace* subjects the Delinquent to the Process of Outlawry; even though there be no *actual Force*. Force is *not* the Criterion, on which the Process of Exigent was founded at Common-Law. 2558, 2559.

10thly. *Proclamations* were *not necessary*: They are not required, in *this Case*, either by Common-Law, or by any Statute. 2559.

A TABLE of the Principal Matters.

- 11thly. If they had been necessary, this *Return* of them is *too loose*; being only “I have caused public Proclamation to be made, *in Manner and Form as I am within commanded.*” *ibid.*
- 12thly. The *first Exaction* was returned to be “at my County-Court held at the Three Tuns in *Brook-Street near Holborn* in the County of *Middlesex*.” And the other Four, “at my County-Court held *at the same Place.*” By this Return, it is shewn, and does appear, (exclusive of the requisite *technical Form*,) “that this County-Court was the County-Court of *Middlesex*, and not of any other County;” and also “That *Brook-street near Holborn* lies in the County of *Middlesex.*” 2560, 2561.
- 13thly. But a *TECHNICAL FORM of Words*, in the *Description of the County-Court* at which an Outlaw is exacted, is requisite: *viz.* that after the Words “at my County-Court,” should be added the NAME of the County; and after the Word “held,” should be added “FOR the County.” 2563 to 2565. The Authorities “that such Words are formally necessary,” begin from 7 *Jac.* 1. as to the former Expression; and from 18 C. 2. as to the latter. 2565.
- 14thly. For Want of these *technical Words*, the Outlawry was REVERSED; as the Authorities were on the *favourable Side*, in a *Criminal Case highly penal*: though it was acknowledged that there is neither Law, Reason, nor Common Sense, in requiring them; and that it does most manifestly appear upon this Record, “that the Court in Question was *of*, and holden *for* the County of *Middlesex.*” *ibid.*

Dacker—

Where he has a *Lien* for the general Balance. 2222.

Parish—

Their Obligation to repair High-Ways. 2511, 2512. See *Highb-Ways.*

Parliament.

The Precept (under 7, 8 W. 3. c. 25. § 1.) ought to be *directed* to the Returning Officer. 2270.

The TIME of the *Delivery* of it to the Returning Officer may be *material* to be proved in an Action against the Returning Officer himself; but not in an Action against a Third Person, for *Bribery.* 2275, 2276.

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Party-Walls

Between Stables. 2298. See *Statutes* (11 G. 1. c. 28.)

Physicians—

Their Incorporation, Constitution, and By-Laws. 2186, 2187.

Qu. Whether *London-Licentiates* are Members of the College, or not. 2194.

Candidates are to be *examined* by the *Comitia minora*: But their Approbation is *not final*. They are to be *proposed* to the *Comitia majora*; and *elected* by *them*; before they can claim to be admitted. 2188 to 2194. See *Mandamus*.

Qu. Whether *Licentiates* have a Right to demand ADMISSION into the College. 2196 to 2202.

Clearly, they have no Right to *Vote* at Corporate Elections, before *actual Admission*. *ibidem*.

They can not, by their *By-Laws*, legally *restrain the Number* of Fellows. 2197 to 2201.

Play—

Quitam Action upon 9 *Ann. c. 14. § 2.* for Money won at Play and its triple Value, how to be brought, and what the Judgment. 2018 to 2022. See *Gaming*.

Pleading

To an Information in Nature of a *Quo Warranto*, where a Defendant has Two *Titles*. 2143 to 2145. See *Information in Nature of Quo Warranto*.

Matter of *Substance* must be *pleaded*: But Matter of *Inducement only* may be given in *Evidence* upon the general Issue. 2469.

So may the Matter of an *exempting Proviso* contained in the same Act of Parliament which gives the Penalty. *ibid*.

The Defendant having been taken in *Execution on a Ca. Sa.* was afterwards *discharged out of Custody*, by *Consent of the Plaintiff*, upon agreeing to pay certain Sums at stipulated Times; Part of which he had paid: But failing in the remaining Payments, the Plaintiff brought an *Action of Debt* upon the *old Judgment*. This Matter being thereunto pleaded, the Plaintiff in his *Replication* acknowledged it; and yet concluded with demanding the *whole* Sum due upon the *old Judgment*. Defendant demurred; and had Judgment. 2483.

1st. An Action of *Debt* will not lie on the *old Judgment*, after a *Ca. Sa.* and Discharge by Consent of the Plaintiff. *ibid*.

2dly.

A T A B L E of the Principal Matters.

2dly. The Replication is *repugnant*, in demanding the *whole* Sum, after acknowledging to have received Part. *ibid.*

Policy of Insurance.

Da Costa underwrote a Policy insuring to *Michael Firth* “lost or
“not lost, *Lisbon* to *Falmouth* or what other Port in *England*
“where his Majesty shall direct his Packets appointed between
“*Lisbon* and *England*, being on each and every Packet-Boat
“which shall sail on the said Voyage; to commence the first
“Day of *October* 1763, and to continue One whole Year or to
“the first Day of *October* 1764 inclusive; upon any Kind of
“Goods and Merchandises whatsoever; beginning the Adven-
“ture immediately from the loading such Goods and Mer-
“chandises at *Lisbon*, and to continue till safely landed.” It
was agreed to be lawful to stop and stay at any Port or Place
whatsoever, without being deemed a Deviation, without Pre-
judice to the Insurance. “The said Goods and Merchandises,
“by Agreement, are and shall be valued at the Sum insured on
“such Packet Boat, without further Proof of Interest than
“this Policy: And to make no Return of Premium for want
“of Interest, being on Bullion or Goods.” In Case of Loss
or Misfortune, it was to be lawful for the Assured and their
Servants to travel for the Defence or Recovery of the Goods,
without Prejudice to the Insurance: To the Charges whereof
the Assurers were to contribute, according to the Quantity of
his Sum insured. The Consideration was Ten *per Cent.*: And
in Case of Loss, the Assured to abate Nothing. All other
Goods, except some which were particularly specified, were
to be free from Average under Three Pounds *per Cent.*; unless
general, or the ship stranded

The said *Firth*, the Insured (the now Defendant,) had an Inter-
est, in *Bullion*, on Board the *Hanover*-Packet, being One of
the King's Packets between *Lisbon* and *England*: Which Pac-
ket was, on the 2d of *December* 1763, totally lost, off *Falmouth*,
in a Voyage between *Lisbon* and *Falmouth*.

The Loss was adjusted, in Writing under the Policy, in the
Words following— “Adjusted a Loss on this Policy, at 100*l.*
“*per Cent.* The *Hanover* Packet, Captain *Sherborn*, being to-
“tally lost at *Falmouth*. Should any Salvage hereafter be re-
“covered, the Insured promises to refund to the Insurers
“whatever he may so recover, in such Proportion as the Sum
“insured bears with the whole Interest. London, the 23d of
“*October* 1764, for *Richard Seward*—*Michael Firth*.” *Da*
Costa accordingly paid this Adjustment to *Firth*.

In *April* 1765, the Iron Trunk which contained all the Bullion
was fished up: And thereby, All the Bullion recovered, with-

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out ANY Loss or Prejudice whatever; and delivered to *Michael Firth*, the now Defendant. But the Defendant *Firth's* Expense of Salvage amounted to 63*l.* 8*s.* 2*d.* and deducting that Sum for Salvage, the Nett Proportion of the Defendant's Share came to 206*l.* 11*s.* 9*d.* The Plaintiff *Da Costa's* Proportion thereof, in respect of his Subscription, amounted to 48*l.* 4*s.* which was paid into Court, upon the present Action.

The present Action was an *Indebitatus assumpsit* brought by *Da Costa*, the Insurer, against *Michael Firth*, the Insured, for 200*l.* for so much Money *had and received by Firth to his Use*. On *Non assumpsit* pleaded, Issue was joined; the Cause tried; and the above Case stated. The Question was—"Whether the Plaintiff, upon this Case, is not intitled to recover in this Action." 1966.

The Court ordered the *Po^{ea}* to be delivered to the Defendant: For, the Adjustment shews, that each Side had given it up as a *total* Loss. It was a solemn *Abandonment*, and an Agreement "that the Insurers should be content with Salvage in such Proportion as the Sum insured bears to the whole Interest." 1970.

They held it to be a *mixed* Policy, and of a *peculiar* Sort, and a *valued* Policy; but a *fair* One, and *without Fraud* or Misrepresentation, and within the Exception of 19 G. 2. c. 37. And therefore the Insured was intitled to receive as for a *total* Loss. The Insurer *agreed* to the Value; and is concluded to dispute it. 1969, 1970.

POOR-Tax. See Orders, Statutes, (43 Eliz. c. 2 § 1.)
Manors, Quit-Rents, Heriots, Hospitals, Rates, Mines, Overseers.

A *Superintendant of Salt-Works*, receiving a Salary by monthly Payments, and removeable at Pleasure, was rated to the Poor, "upon the Account of his *Salary only*." The Court held, that this is *not such* a Species of Property as can be rated to the Relief of the Poor, as personal Estate within the Parish. 2014, 2015.

Personal Property and Stock in Trade—Whether *rateable* to the Poor-Tax, or not. 2294.

Is to be paid by the *Occupier*: And the Person rated must be rated in that Character. 2439.

Hospital-Officers may be rated as *Occupiers*, for their distinct *Apartments*. *ibid.*

But *Hospital-Servants* can not: Neither can the *Corporation*. *ibid.*

The *Poor* in *Hospitals* are properly the *Occupiers*: But they can not be rated at all. *ibid.*

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Post-Master. See Letters.

Poundage. See Sheriff.

Practice.

A *Writ of Possession*, upon a Judgment in Ejectment, *tested* before the *Death of the Lessor of the Plaintiff*, but not *actually sued out* till after his Death, is regular: It has *Relation* to the Teste. 1971.

Costs upon a *Remanet*. 1986 to 1990. See *Remanet*.

Attorney for Plaintiff *neglecting to charge* the Defendant being in Custody, with a Declaration, *within Two Terms*, is liable to the Plaintiff in an *Action*, but not in a *summary Way*. 2060 to 2063. See *Attorney*.

The Court will not grant an *Information* for a Misdemeanour, upon the Motion of the *Attorney-General* on behalf of the *Crown*; because he may do it himself, if it appears to him to be proper. 2090. v. *supra* (under pa. 1565.)

Security for answering Costs—not required of a *Foreign Plaintiff*, nor of a Plaintiff gone abroad, having left no *Effects* in *England*. 2105.

A Defendant under an *Attachment* must *answer Interrogatories*: He can't come in, and *confess* the Contempt, *before* answering *Interrogatories*. 2106.

Bail is *excepted to*, and therefore does not justify; but omits getting his *Name struck out* of the *Bail-piece*: He may, when attached, apply for an *Exoneretur*, to be entered *nunc pro tunc*. 2107. See *Bail*.

Indictments for Nuisances—must be demurred to: The Court do *not quash them on Motion*. 2116.

About holding to *special Bail*—The King's Bench and Common Pleas *differ*, where an *Action of Debt* is brought upon a *Judgment for upwards of 10l.* but the *Original Cause of Action* was *under 10l.* The former discharge on *Common Bail*: The latter require *special*. 2118.

Rule to shew Cause why *Costs* should not be paid to the *Prosecutor* out of the *Money levied* on a *forfeited Recognizance*. The *King is only a Trustee* for the Party. 2119

Concerning *Costs* on removing an *Indictment* by *Certiorari* at the Instance of the Defendant; where the Defendant has been convicted and fined, and the *Prosecutor* has received a *Third* of the *Fine*. 2126. See *Costs*.

Concerning allowing *Interest*, upon *Affirmance of Judgments*. 2128. See *Interest*.

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On a *Rescue* returned. 2129. See *Attachment, Rescue*.

Motions in Arrest of Judgment must be made within the *first Four Days* of the Term: But *Sunday* is *not* to be esteemed One of the Four. 2130.

Of *surrendering Principal*, by *Bail*—They have till the *quarto die post* (*sedente Curia*,) where 'tis by *Original*. 2134. See *Bail*.

Warrant for a Tales, on a Trial in a County *Palatine*—is to be from the *King's Attorney-General*. 2171, 2174.

Concerning delivering *Declarations by the BY*. 2181. See *Declaration*. *Rules of Practice* may be *dispensed* with, or *relaxed* by the Court, upon sufficient Reasons; being only made in Advancement of Justice. 2211.

Variance between Declaration and Process. 2417. See *Variance*.

A *Non pros*: against the Plaintiff, for not declaring within Time, in an Action of *Trespass* against several, ought to be *joint*; not a distinct One for each Defendant. 2418.

A *Scire facias in Error* needs not lie *Four Days* in the Office; as a *Scire facias against Bail* must. 2439.

A Plaintiff obtained Judgment. The Defendant brought a Writ of Error, and transcribed: And it remains undetermined. The Plaintiff brought an Action of Debt upon his Judgment, and got Judgment by Default; and took out Execution. The Court *stayed his Proceedings*, till the *Writ of Error* should be determined. 2454, 2455.

On the *last Day of a Term*, a Motion “to answer the Matters of an *Affidavit*” can not be made. 2502. v. *supra* (under pa. 651.)

After *Bail* had justified, the Plaintiff's Attorney (*without disclosing this*) obtained a Side-Bar Rule “to *discontinue* upon Payment “of Costs;” and then brought a *new Action*. The Court discharged the Side-Bar Rule. 2502, 2503.

Principal and Accessary.

Principal in the *second Degree*. 2073 to 2086. See *Riot*.

Printing—

When and where, and by *whom*, first *invented*: And *when, how*, and by *whom*, first introduced into *England*. 2410 to 2416.

Prison. Prisoners—

Not charged with a Declaration within Two Terms, are intitled to be discharged; and the Plaintiff's Attorney liable to an Action for

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his Neglect. 2060 to 2063. See *Attorney, Practice, Statutes* (4 & 5 *W. & M. c.* 21.)
Brought up to the Sessions to be *discharged* on 5 *G. 3. c.* 41. The Sessions *declare him irrelievable* because charged with an *Outlawry*; and remand him. This *negative Judgment* is a Nullity. 2119, 2120. and 2127.
Fined for Perjury—can't be discharged as an insolvent Debtor. This is not a Debt, but a *Punishment*. 2142.
The Act of 32 *G. 2. c.* 28. § 13. construed favourably for them. 2526.

Prohibition—

To the *Admiralty-Court*, in a Suit there, for *Seamen's Wages*, shall go, if the Agreement be *special*, or *under Seal*. 1950, 1951. See *Mariners*. Confirmed *post Pa.* 2037, 2038. But
After Sentence, a Prohibition shall not go, unless the Want of Jurisdiction in the Court below appears upon the *Face of the Proceedings*. 2036 to 2040.
If the Ground of applying for a Prohibition be *debors* the Proceedings, the Truth of the Suggestion must be verified by *Affidavit*: Otherwise, if it appears upon the *Face* of them. *ibid.*
To the Consistory Court of *London*, in a Cause for calling "*Whore*" in *London*—There must be *Affidavit* of the Custom, and that the Words were *spoken there*. 2032.
Such a Custom must either be *pleaded*, or verified by *Affidavit*: A *Suggestion* alone is not sufficient. 2039, 2040.
Lies to the *Spiritual Court*, to stay their Proceedings for calling "*Whore*," in *London*, where the Words are, by the Custom, actionable. 2418. v. *supra*, 2032.

Property

Literary—fully discussed. 2303 to 2418. See *Authors*.

Quo Warranto. See Information in Nature of a Quo Warranto.

Ramsgate-Harbour.

The *Duty* imposed by 22 *G. 2. c.* 40. is not payable by Vessels *not going through the Downs*, but passing by the North-east Side of the *Godwin-Sands*. 2258.

Rates.

A T A B L E of the Principal Matters.

Rates.

A *Poor-Rate* was quashed *generally*, by the Sessions upon an Appeal, without giving *any Reason why*. They can't be compelled to *specify their Reasons*: It is left to them, to exercise their Discretion. 2103. v. *infra*, 2494.

Personal Property and *Stock in Trade*—whether *rateable*, or not. 2294.

Poor-Rates made upon Governors of *Hospitals*, or their *Officers* (having distinct Apartments,) or their ordinary *Servants*. 2435 to 2439. See *Hospitals, Poor-Tax*.

Whoever is rated to the *Poor*, must be rated *as Occupier*. *ibid*.

A *Poor-Rate* confirmed by the Sessions shall not be set aside, unless it *appears manifestly* to be *unequal*. 2494. v. *supra*, 2103. The Rate in Question assessed Occupiers of *Lands*, at *three-fourths* of the yearly Value; and Occupiers of *Houses*, at *two-fourths*: To which, all the Parish had agreed; and yet One of them, long afterwards, appealed from it. The Court refused to quash the Order of Sessions which confirmed it. *ibid*.

Recognizance—

Forfeited—The King is only a *Trustee* for the Party. 2119. See *Practice*.

Under 5 & 6 *W. & M. c.* 11. § 2, 3. (made perpetual by 8 & 9 *W. 3. c.* 33.) where the Defendant has been *convicted and fined*; and the Prosecutor has *received one-third of the Fine*: So much shall be *deducted* out of the *Costs*. 2126. See *Costs, Certiorari*.

Recorder.

A *wilful Neglect* to *attend the Sessions*, is a Cause of *Forfeiture*: But a *single Instance* of Absence, where Nothing of Importance was expected or likely to happen, nor any Notice given to attend, is not so. 1999 to 2008.

Relation.—See *Fiction*, *Teste*, *Pleading*, *Declaration*.

An *Admittance* relates back to the Time of the *Surrender*. 1961, 1962.

So does a *Disseisee's* Entry or Release, to the Time of the *Disseisin*. *ibid*.

So, an *Escheat* after the Date of a Will. *ibid*.

Of a *Conveyance*—The *whole* of it shall be taken *together*: And the several *Parts* of it shall relate back to the *principal Part*. 1962.

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Of a *Writ of Possession*, to its *Te.le.* 1971. See *Ejection, Practice.*

Remanet.

If a Cause goes off upon a *Remanet*, the general Rule is, " That " the *Costs* occasioned thereby shall *attend the Event* of the " Cause." 1990. But this general Rule implies an *Exception* of such particular Cases as are clearly distinguished by their Circumstances, from being within the *Reason and Principle* of the general Rule: Provided the Application be in *due Time.* *ibid.*

Rescue—

Fine for it. 2130. See *Sentence, Attachment, Practice.*

Restoration-Day.

Only one Judge goes to *Westminster-Hall*: But necessary Business may be done. 2089.

Return—

To a *Mandamus*—may contain one, or more, or any Number of Causes; provided they be *consistent* with each other. 2044 to 2046.

Reversioner

May bring an *Action* for an Injury done to the *Value* of the Inheritance. 2141.

Revocation

Of a *Will*—A subsequent Admittance according to the Tenor of a prior Surrender, is no Revocation. 1962. See *Copyhold.*

Of a *Will*—A Remainder-Man in Fee makes his Will: Afterwards, the Tenant for Life dies, in the Testator's Life-Time. The Will is *not* revoked thereby. *ibidem.*

Of a *Will*—by *Alteration of Circumstances*; and particularly, by *marrying* and having Children. 2167 to 2171.

1st. As to *personal Estate*—Marriage and a Child, is a Revocation: But Marriage alone has not yet been so holden. 2171.

2dly. As to *real Estate*—The *Reason* is the same: And great Opinions have been so. *ibid.* See *Devise.*

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Of a *Will of Lands*—It was made in 1757: The Testator duly executed a second, in 1763. Both of them devised the Lands to the Defendant. The *former* was *never cancelled*: The *latter* was *cancelled by the Testator himself*. Both were in his Custody, at his Death. The *first Will stands good*. 2514, 2515.

Riot.

John Royce was indicted at a Session of *Oyer and Terminer* on 1 G.

1. Stat. 2. c. 5. § 5. for a capital Felony, as principal in the second Degree. A special Verdict found, that he and divers others unknown, to the Number of One Hundred and more, did with Force and Arms, unlawfully riotously and tumultuously assemble together, to the Disturbance of the public Peace; and being so assembled, divers of them did with Force and Arms, unlawfully and with Force, feloniously begin to demolish and pull down a Dwelling-House in the Indictment specified; and that *Royce* was *present*, and did then and there *encourage and abet* the said Persons unknown in beginning to demolish and pull down the said Dwelling-House, by then and there SHOUTING and using EXPRESSIONS to *incite* the said Persons unknown so to do: But that he did *not* with Force begin to demolish or pull down, or *do any Act* with his *own Hands or Person* for that Purpose; *otherwise* than as aforesaid. 2073 to 2086.

1st. This Offence, which was before this Act of Parliament only a Misdemeanour, is by it made *Felony without Benefit of Clergy*. 2078. 2080.

2dly. Persons *present, aiding and abetting*, are *Principals in the second Degree*, and are within this Statute, and ousted of Clergy. 2076. 2081. 2081.

3dly. This Verdict *sufficiently* finds this Man to be a *Principal in the second Degree*. 2083.

4thly. The following Objections in Arrest of Judgment were over-ruled: *viz.*

1st. The Commission of Gaol-Delivery does not, as set out, shew that the Judge was of the *Quorum*. 2084.

2dly. *No Issue* is joined upon this Record. *ibid.*

3dly. *Non constat by whom* the Justices were assigned. *ibid.*

4thly. *Three* were indicted: But it don't appear what became of the other Two. Therefore the Record is incomplete. 2085.

Rivers—

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Rivers—

Fishery in them. 2162 to 2165. See *Fishery*.

Rolls.

Leases by the Master of the Rolls for the Time being, under 12 C. 2. No. 49. 1975.

1st. They may be made *in Trust for himself*. 1979, 1980.

2dly. Though the Proviso restrains from making any *new* or *concurrent* Lease (after having been once letten according to the Power,) *until within seven Years of the Expiration* of the Lease in being, nor for longer than 21 Years from the making; yet this Restriction is not confined to Expiration *by Efflux of Time*, but includes *Surrenders*, and may be *repeated toties quoties* upon proper Surrenders; so that the Reversion be not charged for longer than 21 Years in the whole. *ibid*.

3dly. The *Acceptance of a new Lease implies a Surrender* of the old one. *ibid*: Provided the new Lease be a good one. *ibid*.

Rules and Practice of the Court. See Practice.

Rules of Practice may be *dispensed* with or *relaxed* by the Court, in Advancement of Justice. 2271. See *Practice, New Trial*.

Rules, General.

What Exceptions are implied. 1986 to 1990. See *Remanet*.

They ought not to be laid down *so strictly and rigidly*, as to occasion greater Inconveniencies than they were intended to prevent. 1996.

Scire Facias

In *Error* needs not lie *four Days* in the Office; as a *Scire facias* against Bail must. 2442. v. *supra*, 1723.

Seamen. See Mariner.

Security for Costs. See Costs, Practice.

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Sentence on Criminals—

- On 5 & 6 E. 6. c. 14. for *forestalling* the Market. See the *Stat.* itself, § 3 & 4, and Title “*Ingrossing*.”
- On 5 G. 1. c. 27. § 1. is, for the first Offence, a Fine *not exceeding* 100*l.* and *Imprisonment* for three Months, and till Fine paid: For the second Offence, *Fine at Discretion*; and *Imprisonment* for *twelve* Months, and till Fine paid. 2026.
- On 23 G. 2. c. 13. § 1. (on the same Subject, against enticing Artificers abroad,) For the first Offence, 500*l.* for each Artificer seduced; and *Imprisonment* for *twelve* calendar Months in the common Gaol, and till the Forfeiture be paid. *ibid.*
- On Return of a *Rescue* (upon mesne Process) is discretionary: Contrary to *Sir T. Jones*, 198 and 2 *Salk.* 586. Both of which Cases assert the *constant* Fine to be *four Nobles* each. 2130.
- Upon *Mr. Wilkes*—for his two Libels, (seditious and obscene.) 2574.
- Of *Imprisonment*—may be to *commence at a future Time*; viz. from and after the Determination of an *Imprisonment* to which he was before sentenced for another Offence. *ibid.* and 2577.

Set-Off—

- Needs not to be pleaded* or given *Notice* of, by the Defendant sued in an Action for Money had and received to the Plaintiff's Use; where the Defendant had paid the Plaintiff his whole Demand, except what he *retained* for his Labour and Service: He may give this in Evidence, without Notice. 2134.
- This is not a *Cross-Demand*, or *mutual Debt*; but a *Charge*, out of the very Sum demanded. *ibid.*

Sheriff. See Return, Bankrupt, Pannel.

- Poundage*—is by 29 *Eliz.* c. 4. For every *twenty Shillings*, twelve Pence, for the first 100*l.* and *six* Pence for every twenty Shillings of the Residue. 1981.
- But the *Crown* are not bound by this Act. *ibid.* and 1983.
- However, an Action brought in the Exchequer by the Sheriffs of *London*, upon a Bail-Bond taken by them in their own Names, for the Appearance of a Defendant taken up upon an Exchequer-Process on the Prosecution of the King's Attorney-General on Behalf of the Crown, for Custom-House Penalties and Forfeitures; and a *Testatum capias ad satisfaciendum* to the Sheriff of *Hertfordshire* against the Bail; can not be con-
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considered as the *Suit of the Crown*, though *averred* to be for the *Benefit*, and on the *Behalf*, and at the *Expence* of the Crown: Nor shall the Sheriff who executed it, be precluded from his Poundage. *ibid.*

On taking a Person upon a *Capias Utlagatum*, what he is to do. 2537 to 2542. See *Outlawry, Statutes* (4 & 5 *W. & M. c.* 18.)

Slander of Title.

To maintain such an Action, there must be *MALICE*, either express or implied. 2425, 2426. And the Words spoken must go to *defeat the Plaintiff's Title*.

If they are spoken, to protect a Person's *own Property*, and prevent *others* from being cheated, the Speaker is excusable. *ibid.*

The *Attorney* delivering such a Person's Message, is not liable to an Action; even though he *varies* from it, in *immaterial Circumstances* and *without Malice*. *ibid.*

Soldier.

Officers and Soldiers in the Service of the *East India Company*. 2419 to 2422. See *East India Company*.

Stamps—

9 *G. 3. c.* 37. § 4. which *discharges from Penalties* Persons who have incurred them, and shall pay the Duty on or before 1st September 1769, bars only *future Actions*; but does not discharge a Defendant against whom there has been a *Verdict before obtained*. 2460 to 2463.

Statutes. See Construction.

12 *C. 2. No.* 49. empowering the *Master of the Rolls* to make *Leases*, in order to new-build the old Houses belonging to the Rolls. 1975. See *Rolls*.

29 *Eliz. c.* 4. concerning Sheriff's Poundage. 1981. See *Sheriff*.

33 *H. 8. c.* 39. § 4. requiring Suits for the *King's Debts* to be brought in the *Name of the King*, and of no other Person. 1984. See *Sheriff, ut supra*.

1 *W. & M. Stat. 1. c.* 18. (the *Toleration-Act*.) *Mandamus* to register and certify a *Meeting-House*. 1991, 1992. See *Mandamus, Meeting-House*.

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- 12 G. 1. c. 29. § 2. *Affidavit* to hold to *special Bail*. 1992 to 1996. See *Bail*.
- 11 G. 1. c. 4. § 2. "No Election" means "no due, legal, valid Election." 2008 to 2011. See *Mandamus*.
- 43 Eliz. c. 2. § 1. A *Salt-Officer* not rateable to the *Poor*, for his *Salary only* 2015. See *Poor-Tax*.
- 7 Ann. c. 12. § 3. The Defendant must be in the Service at the Time of the Arrest. 2016, 2017. See *Ambassador*.
- 7 Ann. c. 12. § 5. The *registering* his Name is no Condition precedent: It relates only to the Proceeding against the Bailiff. *ibid*. See *Ambassador*.
- 9 Ann. c. 14. § 2. *Qui tam Action* for Money won at Play, and the triple Value of it, brought by a common Informer. The Offence charged at *Westminster* in *Middlesex*; and Judgment for the Informer and the *Poor of St. Paul's Covent-Garden*: Also Judgment that the Informer have *Damages for Detention* of the Debt, and Costs of Increase. Affirmed for the Debt: Reversed for the *Damages and Costs*. 2018 to 2021. See *Gaming*.
- 5 G. 1. c. 27. § 1. } The latter seems to be a *Repeal* of the for-
23 G. 2. c. 13 § 1. } mer. 2026. See *Sentence*
- 9 Ann. c. 20. (the *Mandamus-Act*) was intended for *speeding* Prosecutions, and to *quicken* the Removal of Usurpers; and intrust the Court with the *Discretion* of granting Leave to private Informers, to use the King's Name: But this Leave ought to be granted upon *proper* Circumstances only. 2120 to 2125.—See *Information in Nature of a Quo Warranto*.
- 1 J. 1. c. 22. § 5. concerning tanning Leather Indictment on it quashed; because *several* Defendants were *joined* in it 2046.
- 4 & 5 W. & M. c. 21. for delivering *Declarations to Prisoners*. 2060 to 2063. See *Attorney, Practice*.
- 7 G. 2. c. 8. to prevent the infamous Practice of Stock-jobbing. 2069 to 2072. See *Bond, Stock-jobbing*.
- 1 G. 1 Stat. 2. c. 5. § 5. 2073 to 2086. See *Principal and Accessary, Riot*.
- 27 H. 8. c. 20. § 1. } discussed both at Bar and Bench; parti-
32 H. 8. c. 7. § 4. } cularly, whether the *Attachment for Con-*
2 & 3 E. 6. c. 13 § 13. } tumacy and *Disobedience* can be applied
for by the *Ecclesiastical Judge*, on 27 H. 8. c. 20 § 1. before Sentence. 2095 to 2100. See *Tithes*.
- 29 C. 2. c. 3. § 17. *Executory Contracts* for Goods are not within this Clause. 2101.
- 6 Ann. c. 16. § 5. A Person who negotiates and concludes Bargains for *Stocks*, for Brokage and Hire, is a *Broker* within this Clause. 2103, 2104.
- 12 G. 1. c. 29. § 1. *Bail* on an Action of Debt on a Judgment for upwards of 10 l. where the original Cause of Action was under 10 l.

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101. The Common Pleas hold to *special Bail*: The King's Bench do not. 2117, 2118.
- 5 G. 3. c. 41. for the Relief of *insolvent Debtors*—A Proceeding upon it. 2119, 2120, and 2127. See *Insolvent Debtors, Prisoners*.
- 5 & 6 W. & M. c. 11. § 2, 3. } Costs to be taxed to the Prosecutor.
8 & 9 W. 3. c. 33. § 1. } 2126. See *Certiorari, Costs*.
- 11 G. 1. c. 4. § 4. The *Swearing in*, under a *Mandamus*, must be before the Officer *then presiding* at such Election under the Statute. 2132.
- 32 H. 8. c. 42. }
18 G. 2. c. 15. } 2133. See *Barbers, Surgeons*.
- 10 & 11 C. 1. c. 3. § 2. *Irish*. 2155. See *Leases*.
- 27 G. 2. c. 17. for *revesting in the Crown* the Power of *appointing the Marshal*, regulating the Office; and rebuilding the King's Bench Prison. 2181, 2184. See *Marshal*.
- 5 & 6 E. 6. c. 14. § 3, 4. See *Ingressing*.
- 2 G. 2. c. 22. § 13 } The Provision does not go to *Goods* or other
8 G. 2. c. 24. § 5. } *specific Things* wrongfully detained. 2221.
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- 34 & 35 H. 8. c. 20. making void Common Recoveries of Lands in *Tail*, where the *Reversion* is in the *Crown*: It protects only Gifts of the *Provision of the King*, and in *Reward of Services*. If the Grant be founded on a *former Right*, it is not within the Protection of this Act. 2223, 2224.
- 8 Ann, c. 25. (a *private Act* about bringing *fresh Water* into *Liverpool*—) 2244. See *Certiorari*.
- 22 G. 2. c. 40. concerning *Duties to Ramsgate Harbour*. 2258. See *Ramsgate Harbour*.
- 7 G. 3. c. 40 concerning *Turnpike Roads* } Carriages employed
7 G. 3. c. 42. concerning *public High-Ways* } only in carrying *any*
8 G. 3. c. 5. concerning *public High Ways* } *One Piece* of Timber
(or Stone) are *excepted* out of the Acts concerning *public High-Ways*; but *not* out of those concerning *Turnpike Roads*. 2258 to 2260.
- 7 & 8 W. 3. c. 25. § 1. The *Precept* ought to be directed to the Returning Officer 2270. See *Parliament*. The *TIME* of *delivering* it to him needs not to be *proved*, in an Action against a Third Person, for *Bribery*. 2275, 2276.
- 5 G. 3. c. 14. § 3. Conviction upon it, quashed. 2279 to 2282. See *Conviction, Fish*.
- 2 G. 2. c. 24. § 8. indemnifying the *Discoverer* of *Bribery* at Elections to Parliament. 2283 to 2287. See *Bribery*.
- 43 Eliz. c. 2. § 1. *Personal Property* and *Stock in Trade*—whether *rateable to the Poor-Tax*. 2290 to 2295.
- 11 G. 1. c. 28. does not extend to *Party-Walls* between *STABLES*: It is confined to *Party-Walls* between *HOUSES*. 2298.

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- 8 *Ann. c. 19.* secures to Authors their *Coty-Right*, for Fourteen Years; and afterwards, for Fourteen Years more, if living at the End of the first Fourteen Years. 2303 to 2418. See *Authors, Literary Property*.
- 13 *G. 2. c. 19. § 5.* prohibits *Horse-Matches* for less than the real and intrinsic Value of 50*l.* unless at *Newmarket* or *Black Hambleton*. 2432, 2433. See *Horse-Match*.
- 5 *G. 2. c. 30. § 7.* discharges conforming Bankrupts from all Debts *due and owing* at the *Time* of their becoming Bankrupts. But *contingent* Ones, not proveable under the Commission, are not discharged by the Certificate. 2446. See *Bankrupts*.
- 5 *Eliz. c. 4. § 31.* (requiring having *served an Apprenticeship*) does not extend to give the *Penalty* against *Journey-men*. 2449, 2450. See *Trade and Trader*.
- 7 *G. 3. c. 42. § 1.* (for the Amendment and Preservation of public *High-Ways*—) Annual Lists are to be made in every *September*; and to be returned to the Justices, who are to nominate Surveyors. *Qu* Whether the Constables, Headboroughs, Tythingmen, Surveyors &c. are such *constituent Parts* of the Assembly who are to make the List, that it is essentially necessary for some of *each* Denomination to be *present* at the making of it. It rather seems that the Legislature only meant that it should be a *full Parochial Meeting*. 2454.
- 9 *G. 3. c. 37. § 4.* (discharging Persons who had omitted to pay *Stamp-Duties*, and should pay them on or before 1st *September* 1769,) has *no Retrospect* to discharge from a *prior Verdict*. 2460 to 2463. See *Stamps*.
- 2 *G. 2. c. 24. § 8.* indemnifying the Discoverer of *Bribery at Elections to Parliament*. 2464 to 2470. See *Bribery, Pleading*.
- 1st. What must be *pleaded*: What must be given in Evidence. *ibid.*
- 2d. *Who* shall be considered as *Discoverer*: The *Prosecutor*, or the *Witness*. *ibid.*
- 2 *G. 2. c. 24. § 7.* No *Damages* for *Detention* of the Debt. 2491. See *Bribery, Error*.
- 16 & 17 *C. 2. c. 8. § 3.* *Bail in Error*, upon a Judgment in *Ejectment*, justify in *double the Rent*. 2502.
- 2 *G. 2. c. 24. § 8.* does not *make* or *consider* the Plaintiff, *conclusively*, the Discoverer. 2504, 2505. See *Bribery*.
- 32 *G. 2. c. 54.* (for repairing the Road from *Dewsbury* to *Ealand* in *Yorkshire*,) excludes the Jurisdiction of the Courts of *Westminster Hall*. 2522. See *Certiorari*.
- 32 *G. 2. c. 28.* (for Relief of Debtors with respect to the Imprisonment of their Persons) § 13. which requires Fourteen Days Notice—construed favourably for them. 2526.
- 4 & 5 *W. & M. c. 18.* “for the more easy *Reversal of Outlawries* “in the Court of King’s Bench”—is perhaps confined to *civil Actions*, and does not at all extend to *Criminal Misdemeanours*:
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But Nothing is clearer than that Cases *after Conviction* of such a Misdemeanour are *not* within it. 2537 to 2542. See *Bail, Outlawry*.

Stock-jobbing—

The Act of 7 G. 2. c. 8. § 5. does not extend to invalidate a Bond given for *reimbursing* a Compounder of Differences who had paid Money for himself and *another jointly concerned* with him, the Sum he had paid on that other Person's Account. 2069 to 2073. See *Bonds*.

Sunday—

Is *not reckoned* as One of the *Four Days* allowed for making Motions in Arrest of Judgment. 2130. See *Practice*.

Surgeons—

Of *London*—incorporated with *Barbers of London*, by 32 H. 8. c. 42. but *separated* from them by 18 G. 2. c. 15. 2133. But the latter Act *only dissolves the Union*: The Two separated Companies remain under the *same Regulations* as before. *ibid*.

Surrender—

Of a *former Lease* is *implied*, on the *Acceptance of a new One*; provided the second Lease be a *good One*: Otherwise, not. 1980. v. next below.
The same Point determined. 2213, 2214. v. last above: And see *Lease*.

Surveyors

Of *High-Ways*—How to be nominated. See *High-Ways*, and *Statutes* (7 G. 3. c. 42. § 1.)

Swearing-in—

Of a *Corporate-Officer* elected under a *Mandamus* pursuant to 11 G. 1. c. 4. § 4. must be *before* the Officer *presiding at such Election*. 2132.

Tales

De Circumstantibus—In a County-Palatine—The *King's Attorney-General* is the proper Person to grant the *Warrant* for a Tales. 2173, 2174.

Tail

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Tail

Of the Gift of the *Crown*; Reversion in the *Crown*. 2224. See *Statutes* (34 & 35 H. 8. c. 20.)

Tenant in Tail—

Of the Gift of the *Crown*. 2224. v. *ut supra*.

Term—

On the *last Day* of it, a Motion to answer the Matters of an Affidavit can not be made. 2502. See *Practice*,

Timber—

Carriages carrying only *One Piece*, are excepted out of the *public High-Way Acts*; but not out of the *Turnpike-Road Acts*. 2260. See *Statutes*.

Tithes—

The *Method of proceeding* for *Subtraction* of them, under 27 H. 8. c. 20 § 1. 32 H. 8. c. 7. § 4. & 2 & 3 E. 6. c. 13. § 13. discussed both at Bar and Bench; particularly, whether the *Attachment* given by 27 H. 8. c. 20. § 1. can be applied for *before Sentence*; and what is the proper Form of the *Certificate and Request* of the *Ecclesiastical Judge*, and of the *Commitment* grounded upon it: But the only Point fully and absolutely determined, was “that 27 H. 8. c. 20. stands *unrepealed*.” 2095 to 2100.

Trade and Trader. See Bankrupt.

Journey-men are not liable to the *Penalty* of 5 Eliz. c. 4. § 31. 2450.

Masters are liable to it, if unqualified themselves, or if they employ unqualified Persons: But a *double Penalty* was not intended. *ibid*.

Trespass.

A merely accidental involuntary *Trespass* may be justified: A voluntary One can not. 2093, 2094. For instance —

1st. *Sheep* were trespassing in the Defendant's Ground. He chased them out, with a little Dog. The Dog pursued them

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them into his next *Neighbour's* adjoining Ground ; though the Defendant called in his Dog, as soon as he had driven the Sheep off from his own Grounds. The Owner of the Sheep brought Trespass for chasing them. It will *not lie*, *ibid.*

2dly. But if Persons enter the Plaintiff's Close, adjoining to his Paddock, with *Guns and Dogs*, not keeping in the *Foot-path* ; and *their Dog* pulls down and kills One of the Plaintiff's *Deer* ; and the Jury (considering this as an *intentional*, not a merely accidental Trespass,) finds for the Plaintiff ; the Court will not set aside their Verdict, even though the Judge who tried the Cause thought it a mere Accident *ibid.*

In Trespass for *taking Goods*, the Declaration must *specify the Particulars*. 2456.

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In a *County-Palatine*—The *Warrant for a Tales* must come from the *King's Attorney-General*. 2173, 2174.

Trover

By *Assignees of a Bankrupt*—will lie, where the Sale was *fraudulent and void*. 2477 to 2482. See *Bankrupt*.

There can be *no set-off*, in Trover. *ibid.*

An Action of Trover must be *founded in Property*. 2481.

Turnpikes.

Timber-Carriages (or *Stone-Carriages*) laden with *only One Piece*, are not excepted out of the Turnpike Acts. 2260. See *Statutes*.

Variance

Between *Declaration and Process*.

1st. An *Executor*, suing out Process *as Executor*, may declare in his *own Right*. 2417, 2418. But

2dly. If a Plaintiff takes out Process to answer to him, *qui tam pro Rege quam pro seipso sequitur*, He can't declare in his *own Name only*. *ibid.*

Venue.

An *Attorney* has *no Privilege* to have the *Venue* changed into MIDDLESEX, where he is DEFENDANT : Though he has a Privilege,

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Privilege, when PLAINTIFF, to lay it and *keep* it in *Middlesex*; unless he sues *in auter Droit*, or *jointly* with another Person. 2027. to 2032.

Barristers, or *Officers of the Court*, have the like Privilege. *ibid.*
In *transitory* Actions, the Plaintiff has a Right to lay the *Venue* *where he pleases*. 2447.

And *such Right remains in him*, where it appears that the County wherein the Cause of Action *really arose* is an improper one to try the Cause in. *ibid.*

“Whether the *Venue* may be *changed* into *Wales*,” remained long undetermined; and is not solemnly determined yet: But it rather seems “that it *may*.” 2450 to 2452

Can't be changed (without Consent) to a County where the Cause of Action did *not arise*: For, the Affidavit must be express “that the Cause of Action arose *in* the County to which the Defendant prays to change the *Venue*; and *not elsewhere*, out “of the said County.” *ibid.*

Verdict.

Excessive Damages—250*l.* were not esteemed so, *against a Sheriff of London*, in an Action brought against him by a Poulterer, for a *malicious Prosecution* by two Indictments for *Nuisances*. 1974.

A Verdict for the Defendant shall *not be set aside*, in a criminal Prosecution, or where a criminal Prosecution might follow from it. 2257.

Viſtaller

Is *not* (*quatenus Viſtaller*) within the *Bankrupt-Laws*. 2064 to 2066.

Uſury.

The Borrower of the Money was holden to be a *competent Witness*, to prove both the *usurious Contract*, and the *Repayment* of the Money. 2251 to 2256. See *Witnesses*.

Wales.

A *Certiorari* lies to a *Welch Quarter-Sessions*, to remove an Indictment up into the *King's Bench*, *per Saltum*; *i. e.* passing over the *Grand Sessions*. 2458, 2459. See *Certiorari*.

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Attesting Witnesses ought not to be admitted to *deny* their own Attestation. 2225.

A “*Lis pendens* concerning the Validity of a Will” is a *sufficient Return to a Mandamus* commanding the Ecclesiastical Judge to grant *Probate* of it. 2295.

Not revoked by a subsequent Will afterwards *cancelled* by the Testator. 2514. See *Revocation*.

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Witnesses.

They ought not to be admitted to *deny their own Attestation*. 2225.

An *Objection to Competency* comes (in Strictness) *too late*; after a Witness has been sworn in Chief, examined, and cross-examined. 2252.

Competency—Credibility—

1st. The Distinction between them is, “That INTEREST goes to the Competency: INFLUENCE, to the Credit only.” 2254, 2255.

2dly. Where the Matter is *doubtful*, the Objection should go to the Credit. 2255.

3dly. On a *qui tam Action* on the Statute of *Usury*, the Borrower of the Money was holden *competent* to prove both the *usurious Contract*, and also “that the Money was *re-paid*.” Note: There was no Bond or Assurance or Contract; the Pledge itself being the Value of the Debt. 2251 to 2256.



F I N I S.

